(10)

No. 03-9168
Title: Reginald Shepard, Petitioner
v.
United States
Docketed: March 1, 2004
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (02-1216)
Decision Date: November 3, 2003
Rehearing Denied: November 24, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Feb 23 2004	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 31, 2004)
Mar 9 2004	Waiver of right of respondent United States to respond filed.
Mar 11 2004	DISTRIBUTED for Conference of March 26, 2004.
Mar 12 2004	Response Requested . (Due April 12, 2004)
Apr 7 2004	Order extending time to file response to petition to and including May 12, 2004.
May 7 2004	Brief of respondent United States in opposition filed.
May 19 2004	DISTRIBUTED for Conference of June 3, 2004.
Jun 14 2004	DISTRIBUTED for Conference of June 17, 2004.
Jun 21 2004	Motion of petitioner for leave to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jul 2 2004	Motion to appoint counsel filed by petitioner.
Jul 8 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 27, 2004.
Jul 21 2004	Motion DISTRIBUTED for Conference of September 27, 2004.
Aug 27 2004	Brief of petitioner Reginald Shepard filed.
Aug 27 2004	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Aug 27 2004	Joint appendix filed. (Jt. appendix in three volumes. Vol.II is sealed.)
Sep 1 2004	SET FOR ARGUMENT Monday, November 8, 2004.
Sep 9 2004	Extension of time within which to file respondent's brief on the merits to and including October 8, 2004.
Sep 15 2004	CIRCULATED.
Sep 23 2004	Record received from U. S.C.A. 1st Circuit. (1 envelope)
Oct 1 2004	Record received from U. S. D. C. for Massachusetts. (1 volume)
Oct 4 2004	Motion to appoint counsel filed by petitioner GRANTED. Linda J. Thompson, Esq., of Springfield, Massachusetts is appointed to serve as counsel for the petitioner in this case.
Oct 8 2004	Brief of respondent United States filed. (Distributed)
Nov 1 2004	Reply of petitioner Reginald Shepard filed. (Distributed)
Nov 8 2004	Argued. For petitioner: Linda J. Thompson, Springfield, Mass. (Appointed by this Court.) For respondent: John P. Elwood, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

[redacted]

No. _____

In The Supreme Court Of The United States

October Term, 2003

03-9168

REGINALD SHEPARD,
PETITIONER,

v.

UNITED STATES OF AMERICA

Supreme Court U.S.
FILED
FEB 23 2004

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS**

NOW COMES Petitioner Reginald Shepard, by and through his undersigned attorneys, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code Section 3006A(d)(6), respectfully moves this Court for leave to proceed *in forma pauperis*, and to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

MAR 1 - 2004

without prepayment of fees. Leave to proceed *in forma pauperis* has never been sought in any other court. No affidavit is attached, inasmuch as Petitioner has been represented by appointed counsel under the Criminal Justice Act of 1964, as amended, in the district court and the court of appeals.

Respectfully submitted,

Linda J. Thompson*
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**Counsel of Record for Petitioner*

Dated: February 21, 2004

No. _____

In The Supreme Court Of The United States

October Term, 2003

REGINALD SHEPARD,
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**Counsel of Record for Petitioner*

Dated: February 21, 2004

QUESTIONS PRESENTED FOR REVIEW

The Armed Career Criminal Act [18 U.S.C. §924(e)] imposes a mandatory minimum sentence of 15 years imprisonment for a person convicted of being a felon in possession of a firearm [18 U.S.C. § 922(g)] where that person has previously been convicted of three violent felonies or serious drug offenses or both. United States v. Taylor, 495 U.S. 575 (1990) held that Congress intended a sentencing court to employ a categorical approach to determine whether a defendant's prior convictions qualify as predicates for this sentence enhancement, looking only to the fact of conviction and the elements of the statute of conviction, or to the charging document and the jury instructions to determine whether all of the elements of generic burglary (an enumerated violent felony) were necessarily adjudicated in the state court. The questions presented are:

1. Whether, where the defendant has pleaded guilty to a nongeneric charge of burglary brought under a nongeneric statute, there is no

contemporaneous record of the guilty plea proceedings and the judgment of conviction reflects a general finding of guilty, the sentencing court is still bound by Taylor's categorical method of application or may instead be required to conduct an inquiry - including an evidentiary hearing - into the facts underlying the conviction, to determine whether, in the guilty plea proceeding, both the defendant and the government believed that generic burglary was at issue?

2. If so, whether the sentencing court may be required to consider a version of these underlying facts found in any document in the court file such as an investigative police report or a complaint application and, if the facts alleged in the document are not challenged by the defendant, regard them as sufficiently reliable evidence that the defendant was convicted of a crime including all of the elements of generic burglary to support an Armed Career Criminal Act enhancement?

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All parties appear in the caption.

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the First Circuit, United States v. Reginald Shepard, No. 99-2167, 231 F3d 56 (1st Cir. 2000), cert. denied, 534 U.S. 829 (2001)["Shepard II"], and United States v. Reginald Shepard, No. 02-1216, 348 F3d 308 (1st Cir. 2003)["Shepard IV"] are reproduced in Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the Court of Appeals was entered on November 3, 2003. Petitioner Shepard filed a timely motion for reconsideration and reconsideration en banc on November 17, 2003. The order denying both was entered November 24, 2003. This petition is filed within 90 days after entry of judgment. See Supreme .Court Rule 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

No constitutional provision is involved.

FEDERAL STATUTE INVOLVED

The text of 18 U.S.C. § 924(e) is reproduced in Appendix D.

STATEMENT OF THE CASE

On March 3, 1999 Petitioner Reginald Shepard pleaded guilty in the United States District Court for the District of Massachusetts to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Thereafter, the Government sought to have Petitioner's sentence enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1)["ACCA"]. The ACCA mandates a fifteen year minimum punishment for a felon who has three prior convictions for a violent felony or serious drug offense.

Under Supreme Court precedent, whether a defendant's prior burglary convictions qualify as predicates for ACCA sentence enhancement is determined categorically by comparing the statutorily-defined elements of the crime of conviction to the elements of "generic" burglary as defined in Taylor v. United States, 495 U.S. 575

(1990). Where, as here, the state statute punishes both generic and nongeneric burglary, the sentencing court "may" consult the charging documents and jury instructions from the state court trial to determine whether all of the element of generic burglary were necessarily adjudicated against the defendant in the state court. Taylor, 495 U.S. at 601-602.

Here, the government presented state court records that Petitioner had five prior felony convictions, each based on a Massachusetts state court guilty plea as possible predicates for sentence enhancement under § 924(e). In each case, Petitioner had been charged under one of two Massachusetts non-generic burglary statutes [one does not require illegal entry if the burglary occurred in the nighttime, and both apply to entry into buildings and to places other than buildings][1].

M.G.L. ch. 266 §16: "Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished ...."

M.G.L. ch. 266 §18: "Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a

Each complaint charged Petitioner solely in nongeneric statutory terms: e.g., "did break and enter in the day time the building, ship, vessel or motor vehicle of Craig Milanesi with intent to commit a felony therein, in violation of G.L. c. 266 s. 18."

No transcript of the guilty plea colloquies or other record of the elements or facts adjudicated in the state plea proceedings was presented to the sentencing court.[2] Neither the statute, the complaint nor the record of conviction evidences that Petitioner necessarily pleaded guilty to generic burglary in any of these proceedings.

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felony, no person lawfully therein being put in fear, shall be punished ...."
[emphasis supplied]

2

The government offered no evidence that verbatim records of the plea colloquies were not actually available. It merely cited the Massachusetts statute that requires the state district courts to keep the taped recordings for 2 ½ years and pointed out that each of Petitioner's convictions was older than that. Rule 211(A)(4), Special Rules of the District Courts (Massachusetts). The government has not said why the federal indictment on which Petitioner was being sentenced was not returned until some three years after he committed the underlying crime.

In four of the cases, the government offered complaint applications and the police reports which accompanied those applications as evidence that Petitioner had been accused of generic burglary in each case.[3] Petitioner objected that these descriptions were not properly included in the PSR and that the factual inquiry suggested by them was precluded under Taylor. Shepard II, 231 F3d at 61.

The district court, Nancy Gertner, J., ruled that Taylor precluded consideration of the challenged police reports and complaint applications. United States v. Shepard, 125 F. Supp.2d 562, 569-570 (D. Mass. 1999)["Shepard I"]. The district court also ruled that the government's documents were not reliable evidence of what was actually adjudicated in the state guilty plea proceedings. Her "lucid rationale" is set out in the First Circuit's first Shepard opinion. Shepard

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These documents were quoted verbatim in the Presentence Investigation Report ["PSR"] which nevertheless did not recommend that Petitioner be sentenced under the Armed Career Criminal Act ["ACCA"]. The First Circuit eventually disclaimed the relevance of the PSR in this case. Shepard IV, 348 F3d at 314.

II, 231 F3d at 61. Judge Gertner declined to sentence Petitioner under the ACCA; but in keeping with the Supreme Court's comment in Taylor, 495 U.S. at 602 n. 10, she found that Petitioner's criminal history score understated the seriousness of his record and departed upward, imposing a sentence of 46 months imprisonment followed by three years' supervised release. Shepard I, 125 F. Supp. 2d at 572. Judge Gertner informed Petitioner that this sentence was designed to allow him to take advantage of an intensive Bureau of Prisons drug treatment program.[4] Id; July 14,1999 Tr:25-26.

Petitioner discharged his 46 month term of imprisonment on January 25, 2002. While he was imprisoned, Mr. Shepard satisfactorily completed a 500-hour drug abuse recovery program. He is currently under supervised release for a period commencing January 25, 2002 and scheduled to continue through January, 2005. Following his release from prison, Mr. Shepard married Regina Chaves Shepard on November 28, 2002 and on April 2, 2003 their daughter Aliana Shepard was born. Aliana is now 10 months old. Mrs. Shepard's six year-old daughter Alexis Huntley lives with the Shepards at 71 Tremont Street in Boston. At present, both Mr. Shepard and Mrs. Shepard are employed. Mrs. Shepard works at The Main Street Grill from 8:30 a.m. to 2:00 p.m. Mr. Shepard works at Consolidated Delivery & Logistics at 65 Sprague Street, Boston, from 4:00 p.m. to 3:00 a.m., working in two capacities. He is a warehouse supervisor from 4:00 a.m. until midnight, and is a

On the government's appeal, the Court of Appeals for the First Circuit reversed, holding that [1] the issue for the district court was whether, in the state guilty pleas, Petitioner and the government both believed that Petitioner was pleading guilty to generic burglary [Shepard II, 231 3d 67-68, 69]; [2]that the district court was required to consider the information in the PSR, the police reports and the complaint applications in making that decision [Shepard, 231 F3d at 67]; and [3] that Petitioner's Taylor objection to the government's documents was insufficient to create an issue of fact as to whether his state court pleas were to generic burglary. Shepard, 231 F3d at 68. Petitioner's motions for reconsideration and reconsideration en banc were denied by the First Circuit Court of Appeals, Judges Selya and Lynch dissenting. A copy of this order is reproduced in Appendix B.

The First Circuit's remand directed the

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delivery driver from midnight until 3:00 a.m. During the mornings while Mrs. Shepard is at work, Mr. Shepard provides the sole care for Aliana.

district court to evaluate the reliability of the police reports as a basis for finding whether the government and the defendant believed that his guilty pleas were to generic burglary, providing an "illustrative" list of questions:

> "As discussed in *Dueno*, did the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct? Where did the police reports come from? What took place at Shepard's plea hearings? More specifically, as discussed in *Harris*, did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime?"

Shepard II, 231 F3d at 68. Shepard was permitted to interpose further objections to the police reports which might, attack "their usefulness for determining whether Shepard and the government both believed that an entry into a building was at issue when he entered the guilty pleas." "Or Shepard might offer an account of what took place at his plea hearings, including the documents before the judge, that raises questions about that issue." Shepard II, 231 F3d at 69.

The government was allowed to present additional evidence,

> "usually limited to examining easily produced and evaluated court documents, including the judgment of conviction, charging papers, plea agreement, presentence report adopted by the court, and the findings of a sentencing judge.' *Spell*, 44 F3d at 939. To that list we add transcripts of the plea hearing or other documents that were before the judge who accepted the guilty plea at issue."

Id. Finally, the First Circuit instructed,

> "In the face of plausible objections from Shepard, and in the absence of a sufficient response from the government, the court may decide that it cannot conclude by a preponderance of the evidence that his pleas of guilty constituted admissions to unlawful entries of buildings. The government, of course, 'bears the burden of proving the applicability of an upward adjustment under the guidelines [or the ACCA]," *Dueno*, 171 F3d at 7."

Id. The district court was required to conduct a mini-trial to determine whether Petitioner's convictions were for generic burglary.

Judge Gertner carefully followed the Court of Appeals remand instructions in resentencing Petitioner. Shepard IV, 348 F3d at 314 n. 6. Petitioner filed an affidavit stating that, in his state guilty pleas, neither the police reports, the complaint applications nor the facts stated in them

had been presented and that he had not admitted to those facts in any of those proceedings. United States v. Shepard (III), 181 F. Supp.2d 14, 19 (D. Mass. 2002). The government submitted no further evidence.[5] Id, at 20, 22-25, 29.

Judge Gertner answered the remand questions:

> "According to the defendant's affidavit and uncontradicted by any other evidence, the court taking the guilty plea did not have before it the police reports and complaint applications described in the PSR or any other documents describing the defendant's affidavit. At Mr. Shepard's plea hearing, no one mentioned the police reports and complain application because the issues never came up. The police reports apparently come from the application for the complaint. There is no indication that they were ever made part of the record of the plea colloquy."

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[5] Judge Gertner repeatedly invited the government to submit affidavits from prosecutors or court personnel regarding standard practices in the state courts in question, as is permitted in Massachusetts practice when convictions are challenged and state court records are not available to settle the disputed facts. See, e.g., Commonwealth v. Quinones, 414 Mass 423, 432, 608 N.E.2d 724 (1993). Shepard III, 181 F. Supp.2d at 19 & n. 11.

The government filed two additional complaint applications or police reports evidencing two additional convictions. Shepard IV, 348 F3d at 310. Although one charges generic burglary, and the other five (total) charge nongeneric burglary, these six complaints have been treated as an undifferentiated group.

Id, at 25-26. After a careful discussion of Taylor and Shepard II, she concluded:

> "On this record, given this case law, I cannot conclude by a fair preponderance of the evidence that Reginald Shepard has been convicted of 'at least' three crimes of violence under the ACCA."

Id, at 29. The judge reimposed her original sentence. The government appealed again, claiming that the allegations in the complaint applications and police reports proved that Petitioner pled guilty to burglarizing buildings. Shepard IV, 348 F3d at 311.

The First Circuit acknowledged that Judge Gertner had carefully followed its detailed remand instructions in resentencing Petitioner[6], it concluded that "it is clearly erroneous to find that Petitioner did not plead guilty to at least

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[6] Shepard IV, 348 F3d at 314 n. 6: "In addition to the tension between the two decisions [United States v. Harris, 964 F2d 1234 (1st Cir. 1992) and United States v. Dueno, 171 F3d 3 (1st Cir. 1999)], our own prior remand in Shepard II may further have complicated matters by not calling attention to the en banc order in Sacko [United States v. Sacko, 178 F3d 1 (1st Cir. 1999)]. In all events, none of this confusion is the fault of the district judge who sought conscientiously to carry out this court's earlier mandate."

three burglaries of buildings." Shepard IV, 348 F3d at 314. The Court of Appeals attributed Judge Gertner's decision to "confusion" created by that ruling. Id. To clarify the law in the Circuit, the Court reverted to the "rule" of United States v. Harris, supra, which both revised Taylor's statement of the pertinent ACCA predicate inquiry and rejected Taylor's limitation on the permitted sources of information in the modified categorical inquiry allowed "in the rare circumstances" where sentencing courts could look past the elements of the statute of conviction. The Court of Appeals assumed that the sentencing court not only could, but must, look beyond the statute of conviction whenever that statute defines burglary more broadly than Taylor's generic definition. Shepard IV, 348 F3d at 310-312. The Court held that the sentencing court not only could, but must, consider any information "from the [state court] case files" in which facts may be found which will assist it in determining what conduct the defendant was charged with in state court. This factual inquiry is not to determine whether the defendant engaged in

conduct which was generic burglary, but to determine whether he was charged with and pleaded guilty to generic burglary:

> "In such a case, we believe it would be appropriate for the sentencing court to look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested (in this context) in the violent or nonviolent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime ('building') rather than the generically non-violent crime ('vehicle') was at issue."

Shepard IV, 348 F3d at 312, quoting Harris, 964 F2d at 1236.

Applying its substitute for the Taylor categorical inquiry, the Court of Appeals held that the police reports and complaint applications, although not part of the charging document, proved that Petitioner had been charged with and pleaded guilty to generic burglary on at least three occasions. Petitioner had

> "been given a full opportunity (by the remand in Shepard II) to explain any circumstance surrounding the pleas that might defeat the natural inference that the pleas were to the crimes described in the case files. * * * [Petitioner] only said that he had not specifically admitted in open court to breaking into houses and that the underlying

police reports were not read to him at the plea hearings.

> Against this background, it is 'clearly erroneous' to find that Shepard did not plead guilty to at least three burglaries of buildings. Absent other evidence of peculiar circumstances, there is a compelling inference that the plea was to the complaint and that the complaint embodied the events described in the application or police report in the case file. If there were countervailing evidence to defeat the inference, we would defer to any reasonable interpretation of the conflict by the trier of fact. But there is no other evidence, nor is it easily imaginable that there would be.
>
> In Harris Judge Breyer referred to what the government and the defendant 'believed' to be the subject of the predicate plea; but he did not suggest that this required direct evidence of the parties' subjective states of mind. Harris, 964 F2d at 1236. His concern was with the nature of the proceedings; in upholding the enhancement Harris relied on objective evidence to characterize the pleas - namely, on police reports in the case file. Unimpeached, those filed carried the day in Harris; they do so here as well."

Shepard IV, 348 F3d at 314. The Court of Appeals concluded:

> "Judged by what Congress wanted, this case is not a close call. If this court's precedents have confused matters, that is our own fault but it is no reason to perpetuate confusion. Harris, with the reliability qualification adopted by Dueno as to the PSR (a point not litigated in Harris and irrelevant here), is the law of this circuit until the Supreme Court or an en banc panel rules otherwise. On remand, the district court must sentence Shepard under the Act and apply the mandatory minimum prescribed by

Congress."

Shepard IV, 348 F3d at 314-315.

On Petitioner's motion, the Court of Appeals has stayed its mandate to permit Petitioner to file this petition for a writ of certiorari. Appendix C.

REASONS FOR GRANTING THE WRIT

THE FIRST CIRCUIT HAS DECIDED AN IMPORTANT AND RECURRING ISSUE OF FEDERAL SENTENCING LAW THAT CONFLICTS DIRECTLY WITH AND UNDERMINES THIS COURT'S HOLDING IN TAYLOR V. UNITED STATES AND WITH RECENT RULINGS OF THE THIRD, FOURTH, FIFTH, SIXTH, EIGHTH NINTH AND TENTH CIRCUITS.

The First Circuit's ruling in this case announces its belief that the Supreme Court's decision in Taylor v. United States, 495 U.S. 575 (1990) provides insufficient guidance to resolve a recurring and widespread problem in the administration of the Armed Career Criminal Act:

> "Until the Supreme Court addresses the open issues, we must use our own reasoning, keeping faith with our own prior precedents."

Shepard IV, 348 F3d at 308. Instead of applying Taylor to Petitioner's case, the First Circuit established its own method of applying the ACCA, saying in conclusion:

> "If this court's precedents have confused matters, that is our own fault but it is no reason to perpetuate confusion. *Harris*...is the law of this circuit until the Supreme Court or an en banc panel rules otherwise."

Id, 348 F3d at 314. Taylor is the Court's only ruling interpreting the ACCA.

As will be seen, the Harris regime is fundamentally incompatible with Taylor, with the decisions of several other circuits and with the Taylor-guided rules of nearly all of the other circuits. The First Circuit's Shepard rulings present an appropriate vehicle by which the Court should address and resolve this pervasive problem concerning mandatory minimum sentences and federal judicial sentencing discretion.

The Armed Career Criminal Act ["ACCA"] imposes a fifteen year mandatory minimum sentence on persons convicted in federal court of being a felon in possession of a firearm who have been convicted of at least three qualifying violent felonies. Congress intended that this mandatory minimum sentence be uniformly and efficiently administered by the federal sentencing courts. In Taylor v. United States, 495 U.S. 575 (1990), the Court

established a comprehensive method for achieving these Congressional goals. First, violent felonies are defined in terms of generic elements so that the variations in state-to-state definitions do not unduly influence uniform administration. Second, a categorical method is employed to classify prior convictions as either generically violent felonies or not. The focus is on the elements of the crime of conviction as evidenced by the statute, the charging instrument and the jury instructions. Only prior violent felony convictions in which the factfinder necessarily adjudicated all of the elements of the generically defined crime can serve as predicates for imposition of the ACCA's mandatory minimum sentence.

But Taylor's categorical method is widely utilized in all the circuits in applying the various sentence enhancements based on prior convictions provided for in the United States Sentencing Guidelines and in immigration matters. The potential impact of the issues raised in this case is both substantial and very broad.

The problem addressed in Shepard II and

Shepard IV is how to classify state court convictions obtained by guilty plea where the state court records of adjudication do not readily disclose the information needed to make the Taylor-defined determination whether a particular state conviction can be used to impose an ACCA sentence enhancement. The First Circuit has devised a system of classifying prior felonies which focuses on the conduct underlying the state court conviction rather than on the elements of the generic crime actually adjudicated. Directly contrary to Taylor's specific prohibition, it requires an evidentiary hearing to determine whether the defendant and the government believed that the generic crime was at issue in the plea proceeding.

The Shepard approach undermines the Congressional goals of uniform application and ease of administration and will lead to sentencing hearings in which the federal court will be litigating the facts of old state crimes and reconstructing long-past state court guilty plea proceedings.

A. The Rulings In Shepard II and Shepard IV Conflict Irreconcilably With Taylor's Categorical Method Of Classifying Prior Felonies By Requiring Factual Inquiries And Evidentiary Hearings Into Whether The Defendant And The Government Both Believed That A Generically Violent Felony Was At Issue In The Guilty Plea.

In Shepard IV the First Circuit said that, because Taylor did not "explicitly rule out attention to other court-related documents or say just how guilty pleas should be parsed" it does not provide sufficient guidance to control the result in Shepard: "Until the Supreme Court addresses the open issues, we must use our own reasoning, keeping faith with our own prior precedents." 348 F3d at 312. From its two conflicting and divergent lines of authorities, it chose to follow the Harris line.

But Harris, as refined in Shepard II and Shepard IV conflicts intolerably with Taylor in every important aspect of both decisions. Taylor requires a determination of whether the factfinder necessarily found the defendant guilty of a crime which includes all of the elements of generic burglary; Shepard IV requires a determination of whether, in the guilty plea, the parties both believed that generic burglary was at issue.

Taylor commands a categorical method of application and prohibits inquiry into the facts underlying the prior conviction; Shepard IV requires an inquiry into the underlying facts. Taylor prohibits holding "mini-trials" to determine the applicability of the 924(e) enhancement; Shepard IV requires evidentiary hearings. Taylor strictly limits the sources of information which may be consulted; Shepard IV requires the sentencing court to consider "reliable" information found any document in the "court file."

Petitioner's case involves the exact issue decided in Taylor: was he convicted of a crime which included all of the elements of generic burglary? Taylor held that, where §942(e) enhancement is sought for a designated violent felony - burglary - the sentencing court must determine whether the defendant was necessarily convicted of a crime which included all the elements of generic burglary. 495 U.S. at 602. This is precisely the issue presented in Petitioner's case.

Taylor held that this determination begins

with a comparison of the elements of the crime defined in the statute of conviction with the elements of generic burglary: "unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime." 495 U.S. at 599. Where, as in Petitioner's case, the statute of conviction includes these elements but is broader, the sentencing court may examine the indictment and jury instructions to determine whether the conviction necessarily resulted from an adjudication of each of the elements of generic burglary against the defendant. 495 U.S. at 602.

Petitioner was convicted under two statutes which penalized burglary of things other than buildings. The complaints at issue did not specifically charge burglary of a building. The record of conviction simply recorded a finding of guilty. No contemporaneous record of the guilty plea proceeding was provided. Nothing in the state court's record of its adjudicative actions established that Petitioner was necessarily convicted of generic burglary. The government

conceded this in the first sentencing hearing. Shepard I, 125 F. Supp.2d at 570 ["The government concedes that without the police reports or complaint applications it cannot determine the precise conduct to which Shepard actually pled guilty."]. Under Taylor's categorical analysis, none of these convictions could be used as enhancement predicates, and Judge Gertner twice made that finding.

But in Shepard II, the First Circuit held that, in these circumstances, the issue becomes whether the defendant and the government both believed that generic burglary was at issue in the guilty plea. 231 F3d at 69. It further held that the answer to this question is found by examining the facts of the underlying crime. This conflicts directly with Taylor's blanket injunction against exactly that inquiry. The First Circuit further held that the sentencing court is required to conduct an evidentiary hearing to determine the answer to its question. Shepard II, 231 F3d at 68-69. Finally, it held that the sentencing court must consider information about the underlying

conduct that is recorded in any document found in the state court's file, and may rely on it provided it determines that the information is sufficiently reliable. Id. This conflicts with Taylor's delimitation of the narrow range of documents [charging document, jury instructions, judgment of conviction] its categorical method allows to be consulted. Taylor, 495 U.S. at 602.

The First Circuit founded its ruling on the premise that Taylor provides inadequate guidance on how to address convictions based on guilty pleas. No other Court of Appeals has come to this conclusion. See, Shepard IV, 348 F3d at 312 n. 4 ["All twelve circuits that have addressed this issue have agreed that Taylor analysis applies after a guilty plea, even though Taylor only explicitly explained how to resolve ambiguity when the prior convictions were obtained after jury trials."]. It appears that the First Circuit's position rests in part on a dislike of the categorical method:

> "There is surely an air of make-believe about this case. No one, and this includes Shepard and the district court, has seriously disputed

> that Shepard in fact broke into half a dozen or more buildings and was consequently convicted upon pleas of guilty under the two Massachusetts statutes in question."

Shepard IV, 348 F3d at 311. The First Circuit held that its decision in United States v. Harris, 964 F2d 1234 (1st Cir. 1992) is therefore the controlling precedent until either an en banc decision or a Supreme Court decision overrules it. Oddly, Harris's formulation of the inquiry into what the parties to the guilty plea "believed" was at stake was part of a hypothetical ["One can, of course, easily imagine a more difficult case:...."]. 964 F2d at 1236. It was *obiter dictum* in the classic sense of that term. Black's Law Dictionary, 7th ed., 1100.

Harris did not involve burglary or any other §924(e) designated violent felony. At issue there was whether the defendant's convictions for assault and battery constituted a conviction for a violent felony under §924(e). 964 F2d at 1235. The Harris court disclaimed the need to consult the statutory elements or the charging document; it relied on information in the federal PSR stating that the

defendant had a knife, concluding:

> "the fact that the 'case files' showed that Harris had a knife suggests that the state charged Harris with, and that he pled guilty to, the harmful type of assault and battery against Hobson."

964 F2d at 1237.

Harris disdained the Taylor categorical method. The First Circuit in Shepard IV likewise avoided Taylor. It made no effort to reconcile its requirement that the sentencing court conduct a mini-trial to determine whether the facts allegedly underlying the charge suggest that, in the guilty plea proceedings, the defendant and the government both believed that the defendant was pleading to generic burglary with Taylor's categorical method. The lower court simply declared that Taylor had inadequately addressed the problem.

The First Circuit's conclusion in Shepard IV that in at least three of Shepard's state court guilty pleas the parties both believed that generic burglary was at issue does not establish, as required by Taylor, that the factfinder adjudicated all of the elements of generic burglary against him in those proceedings. If the matter was put to

Shepard in the boilerplate language of the statute or complaint and he pleaded guilty as charged, the "building" element was not necessarily adjudicated. United States v. Richardson, 313 F3d 121, 128 (3rd Cir. 2002); United States v. Barney, 955 F2d 635 640-641 (10th Cir. 1992); United States v. Parker, 5 F3d 1322, 1327 (9th Cir. 1993). The evidence before the sentencing judge did not establish that Shepard was "necessarily" convicted of a crime which included all of the elements of generic burglary.

This Court established with unmistakable clarity that this is the fundamental requirement of Taylor, applicable equally to jury trial and guilty plea adjudications. Shepard IV establishes an alternative system which discards the Congressional objectives of uniformity and ease of administration in favor of fact-intensive mini-trials designed to insure that the ACCA enhancement is applied as broadly as possible. 348 F3d at 311.

B. The First Circuit's Precedents Applying Taylor Consist Of Two Diametrically Opposed Lines Of Authority Which That Court Cannot Reconcile Without The Court's Assistance.

The First Circuit has developed two irreconcilable lines of authority, each purporting to employ the Taylor categorical analysis in determining whether a prior conviction qualifies for purposes of enhancing punishment as either a "violent felony" (ACCA - §924[e]) or a "crime of violence" (career offender - §4B1.1).

In cases where the prior conviction resulted from a guilty plea; the definition of the prior offense includes, in a single statute, both violent and non-violent versions; and, the charging document simply contains the boilerplate statutory formulation, the sentencing court is required to examine facts underlying the prior offense and make a determination from those facts as to whether "the defendant and the government both believed that the generically violent crime...rather than the generically non-violent...crime was at issue." United States v. Harris, 964 F.2d 1234, at 1236 (1st Cir. 1992); United States v. Dueno, 171 F.3d 3, 5 (1st Cir. 1999); United States v. Shepard (II), 231 F.3d 56, 67 (1st Cir. 2000); United States v. Shepard (IV), 348 F.3d 308, 313-314 (1st Cir. 2003). The facts that the sentencing court

must examine may be drawn from any sufficiently reliable source, such as the PSR's factual description of the prior offense (United States v. Harris, Id.; United States v. Bregnard, 951 F.2d 457, 460 [1st Cir. 1991]) or a police report contained in the state court file. (United States v. Dueno, Id.; Shepard II, at 67-68; Shepard IV, Id.). The fact source need not have played any role in the adjudication of the prior conviction and must be accepted as reliable by the sentencing court unless factually controverted by the defendant. (Bregnard; Harris; Shepard IV). The sentencing court has no discretion to apply Taylor strictly, looking only to such factual information as may be contained in the charging document. Shepard II and Shepard IV. In short, where the underlying facts show that the defendant was probably charged with a violent felony, the conviction will be used to enhance the punishment.

However, where the "otherwise" clause is the focus of the Taylor analysis, the First Circuit forbids inquiry into whether the defendant actually committed the offense in a violent manner, strictly adhering to Taylor's formal categorical approach.

United States v. Damon, 127 F.3d 139, 146 (1st Cir. 1997). The offense specific conduct/fact is considered only to the extent that it is set out in the charging document and then only in the context of the categorical analysis:

> . . . [E]ven where, as here, the category limned in the statute is an inexact semantic construct, warranting further inquiry, the task of classification continues to demand a categorical as opposed to a fact-sensitive approach. This means that if previous convictions for racketeering or racketeering conspiracy are in issue, a court seeking to ascertain the appropriateness of predicate offense treatment under *Taylor* principles must ask categorically oriented questions such as: "Racketeering by what means?" "Racketeering to what end?" And in answering these questions, the court should not plunge into the details of a particular defendant's conduct, but, rather, again in fidelity to *Taylor* principles, should merely assess the nature and object of the racketeering activity **as described in the indictment** and fleshed out in the jury instructions. (Emphasis added)

United States v. Winter, 22 F.3d 15, 19 (1st Cir. 1994)(Affirming the sentence imposed without recourse to the career offender guidelines).

In United States v. Damon, the First Circuit refused to consider the violent conduct actually involved in the defendant's prior conviction for criminal mischief, despite the authority to do so

apparently supplied by Harris. Rather, the Court of Appeals reversed the district court's determination that criminal mischief was a crime of violence, where that determination depended upon examination of the conduct underlying the conviction (concededly violent - arson):

> In light of *Taylor* and the changing definitions from the Sentencing Commission, we think the district court was precluded from looking so deeply into the nature of the predicate offense. That the court thought it permissible to do so under our decision in *Harris* was not unreasonable, but as we now clarify, was wrong.

127 F.3d 139 at 144.

The strict Taylor analysis was employed by the First Circuit to affirm enhancement under the career offender provisions of §4B1.1 based on a prior conviction for statutory rape where the only offense specific facts considered by the sentencing court were contained in the indictment for the prior offense. United States v. Meader, 118 F.3d 876, 883 (1st Cir. 1997) And in United States v. Sacko, 178 F.3d 1 (1st Cir. 1999), the Circuit disapproved of the district court's reliance on facts set out in the PSR to conclude that the defendant's prior conviction for statutory rape was

a violent felony requiring an enhanced ACCA punishment:

> Because statutory rape can encompass both violent and non-violent conduct, it was permissible for the district court to examine the indictment to learn that "George Sacko [age 21] ... did engage in sexual penetration, vaginal intercourse, with [Jane Doe], age 14 ...." [footnote omitted] The district court's investigation of the circumstances of the crime should have ended there. [footnote omitted] It was error for the district court to delve into the facts of Sacko's crime in order to determine whether his conviction was for a violent or a non-violent crime.

United States v. Sacko, supra, at 4-5.

This conflict within the First Circuit regarding the proper application of the Taylor categorical analysis must be resolved. The Harris line of authority, rather than Taylor, is now the engine that drives the analytical train in the violent felony - crime of violence enhancement determination. The Circuit, acting on its own, cannot resolve this conflict:

> In virtually all circumstances, newly-constituted panels with a circuit are bound by the holdings of prior panels. [Citations omitted] Given the force of this rule and its applicability here, I acknowledge that *United States v. Shepard, 231 F.3d 56, 66 (1st Cir. 2000)*, dictates the outcome of this appeal. I write separately, however, because I believe that Shepard, and cases like it,

> take impermissible liberties with the narrow exception envisioned in *Taylor v. United States, 495 U.S. 575, 602, 109 L.Ed.2d 607, 110 S.Ct. 2143 (1990)*, and, thus, undermine the integrity of the categorical approach favored by the Supreme Court for cases in which the predicate offenses are used to enhance defendants' sentences. Were we writing on a pristine page, I would hold that particularized inquiry of the type and kind approved in the majority opinion (inquiry which ranges well past the charging papers, jury instructions, and other formal accouterments of the predicate offense to a copy of a police report compiled by an investigating officer) to be beyond the limits contemplated by the Taylor Court. The page, however, is not pristine, and so I reluctantly concur in the judgment of the panel.

United States v. Delgado, 288 F.3d 49, 57 (1st Cir. 2002) (Selya, Circuit Judge concurring).

Mr. Shepard's Petition for Writ of Certiorari should be granted to clarify the proper application of the Taylor categorical analysis to convictions obtained by guilty pleas.

C. The Rulings In Shepard II and Shepard IV Conflict Irreconcilably With Recent Rulings By The Third, Fourth, Fifth, Sixth, Eighth, Ninth And Tenth Circuits Rejecting The Use Of Factual Inquiries In Applying Taylor's Categorical Method Of Classifying Prior Convictions And Adhering To Taylor's Definition Of The Issue.

The First Circuit rule requiring that the sentencing court conduct an evidentiary hearing to

determine whether a state court conviction was for an ACCA predicate where both the statute of conviction and the charging document are nongeneric is unique among the Circuits. Most circuits strictly limit the sentencing court's inquiry in these circumstances and restrict the sources of information correspondingly to state court documents which record or reflect adjudicatory actions from which the elements actually adjudicated can be readily determined. The general rule is that any dispute about the nature of the conviction must be resolved from the text of the charge and record of conviction, and not by holding an evidentiary hearing. See, United States v. Howze, 343 F3d 919, 921 (7th Cir. 2003); United States v. Parker, 5 F3d 1322, 1327 (9th Cir. 1993).

Shepard II and Shepard IV directly conflict with United States v. Bentley, 29 F3d 1073 (6th Cir. 1994), where the application of an ACCA enhancement turned on whether the defendant's guilty plea under an Ohio burglary statute which punished both burglary of structure and "trespass" on land with intent to commit a felony. 29 F3d at 1077-1078.

The indictment charged "trespass on the land or premises" and the judgment of conviction described the crime as breaking and entering. Id. The Sixth Circuit rejected the government's argument that the particular circumstances showed that Bentley actually did enter a structure rather than merely trespassing on land:

> "The similarity of the language of the indictment to the language of §2911.13(B) demonstrates that, had Bentley not pled guilty, the jury would not necessarily have had to find the elements of burglary in order to convict him. Under Taylor, then, we do not inquire into the specific circumstances of the past convictions, but rather we decide the issue based solely upon the statutory definitions of the prior offenses."

29 F3d at 1078. The First Circuit's Shepard holdings also conflict intolerably with the rules in the Third, Fourth, Fifth, Eighth, Ninth and Tenth Circuits in this regard. That is, no inquiry into specific circumstances, much less an evidentiary hearing, is permitted. United States v. Richardson, 313 F3d 121, 127-128 (3rd Cir. 2002); United States v. Kirksey, 138 F3d 120, 124-125 (4th Cir. 1998); United States v. Allen, 282 F3d 339, 343 (5th Cir. 2002); United States v. Taylor, 932

F2d 703, 707 (8th Cir.), cert. denied, 502 U.S. 888 (1991); United States v. Sparks, 265 F3d 825, 835 (9th Cir. 2001); United States v. Barney, 955 F2d 635, 640-641 (10th Cir. 1992).

Other circuits also observe strict limits on the sources of information the sentencing courts may rely upon in making the Taylor determination, both on analogy to those sources approved in Taylor and in recognition that such limits safeguard the Taylor injunction against delving into the facts underlying the prior convictions:

> "We read Taylor as allowing the sentencing court to consider only the statutory definition of the offense, the charging paper and jury instructions. Any different rule raises the possibility of mini-trials to determine the facts underlying a prior offense. Such an 'elaborate factfinding process regarding the defendant's prior offenses' is specifically barred by Taylor. 495 U.S. at 601, 110 S.Ct. at 2159."

United States v. Allen, 282 F3d at 343 [rejecting reliance on police report information which might have excluded conviction as ACCA predicate]; United States v. Richardson, 313 F3d at 128 ["The daunting practical difficulties and the due process and Sixth Amendment concerns that surface when a

sentencing court makes factual determinations concerning a defendant's prior convictions highlight the necessity of strict adherence to the categorical approach prescribed by Taylor."]. See also, United States v. Bentley, supra (6th Cir. 1994); United States v. Sparks, 265 F3d at 836 (9th Cir. 2001) [sources limited to indictment, judgment and "judicially noticeable facts"].

The First Circuit's Shepard IV ruling also conflicts with the rulings of the Third, Ninth and Tenth Circuits regarding the permissibility of basing an ACCA predicate determination solely on the content of the charging document. Shepard IV declares a "compelling inference" that the guilty plea to a nongeneric burglary complaint [as supplemented by a police report] is to the clarified generic burglary charge. 348 F3d at 314. In United States v. Richardson, 313 F3d at 127-128, the Third Circuit said: "[A]n enhancement cannot be based solely on an allegation in the charging document when the conviction for the charged offense or offenses could have been obtained without that allegation having been proved." The

same rule prevails in the Ninth Circuit. United States v. Parker, 5 F3d 1322, 1327 (9th Cir. 1993).

The factual inquiry required by the First Circuit conflicts intolerably with the inquiry conducted in all other circuits. Where the statute of conviction and the charging instrument charge nongeneric burglary in a guilty plea case, the First Circuit's Harris inquiry is whether both parties believed that generic burglary was at issue in the plea. The other circuits invariably focus on whether the records documenting the conviction establish that all the elements of generic burglary were adjudicated. The Tenth Circuit's statement is typical:

> "We join (Circuits Seven, Eight and Nine)...in holding that where enhancement is sought on the basis of a conviction obtained through a guilty plea, the sentencing court may look to the underlying indictment or information and the text of the guilty plea to determine whether the defendant was charged with and admitted conduct which falls without question into the ambit of Taylor's generic definition."

United States v. Barney, 955 F2d at 639. No other court has abandoned Taylor's inquiry for the First Circuit's formulation.

Certiorari should be granted to resolve these intolerable conflicts between the First Circuit and her sister Circuits.

CONCLUSION

The First Circuit believes that this Court's ruling in Taylor provides inadequate guidance on how to classify state court convictions under the ACCA when they rest on guilty pleas to nongeneric charges brought under nongeneric statutes. It has devised its own system which is fundamentally at odds with Taylor's categorical method of classification as applied in at least the Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits, and with its own application of Taylor's method in its career offender and USSG §4B1.2 line of cases. The issues presented here substantially impact the uniform and efficient administration of the ACCA and other sentence enhancement provisions nationally and within the First Circuit.

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

United States v.Shepard (IV),
348 F.3d 308 (1st Cir. 2003)

United States v. Shepard (III),
181 F.Supp.2d 14 (D. Mass. 2002)

United States v. Shepard (II),
231 F.3d 56 (1st Cir. 2000)

United States v. Shepard (I),
125 F.Supp.2d 562 (D.Mass. 2000)

UNITED STATES OF AMERICA, Appellant, v. REGINALD SHEPARD,Defendant, Appellee.
No. 02-1216

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

348 F.3d 308; 2003 U.S. App. LEXIS 22584

November 3, 2003, Decided

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Nancy Gertner, U.S. District Judge. *United States v. Shepard, 181 F. Supp. 2d 14, 2002 U.S. Dist. LEXIS 1280 (D. Mass., 2002)*

DISPOSITION: Vacated and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant pled guilty to violating the federal statute prohibiting a felon from possessing a firearm, *18 U.S.C.S. § 922*(g)(1). Plaintiff government appealed the ruling of the United States District Court for the District of Massachusetts that declined to apply the Armed Career Criminal Act (Act) to defendant. The sentence was reversed and remanded. On remand, the district court again refused to apply the Act. The government appealed.

OVERVIEW: At issue on appeal was whether defendant's previous state court convictions for breaking and entering qualified as violent felonies under the Act. In each of the state cases, the complaint merely charged defendant in the boilerplate language of the statutes, leaving it unclear just what kind of structure defendant had entered. Thus, the complaints alone did not reveal whether defendant had broken into a building or some lesser enclosure such as a car or boat. The court of appeals found that it was "clearly erroneous" to find that defendant did not plead guilty to at least three burglaries of buildings. Absent other evidence of peculiar circumstances, there was a compelling inference that the plea was to the complaint and that the complaint embodied the events described in the application or police report in the case file. If there were countervailing evidence to defeat the inference, the court would defer to any reasonable interpretation of the conflict by the trier of fact. But there was no other evidence, nor was it easily imaginable that there would be.

OUTCOME: The sentence of the district court is vacated and the matter remanded for re-sentencing in conformity with this decision.

CORE TERMS: burglary, generic, pled guilty, breaking and entering, sentence, violent felonies, guilty pleas, presentence, indictment, convicted, charging, sentencing, predicate, boat, information contained, crime of violence, minimum sentence, criminal conduct, violent felony, career, prescribed, violence, happened, burglar, embrace, venue, label, felon, plea hearing, mandatory minimum

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure: Sentencing: Criminal History: Prior Felonies
Criminal Law & Procedure: Sentencing: Sentencing Ranges
[HN1] Under the amended Armed Career Criminal Act, *18 U.S.C.S. § 924*(e), a 15-year mandatory minimum sentence is required for anyone convicted as a felon in possession of a firearm who has three or more prior convictions for a "violent felony" or "serious drug offense."

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
Criminal Law & Procedure: Sentencing: Criminal History: Prior Felonies
Criminal Law & Procedure: Sentencing: Sentencing Ranges
[HN2] Under the Armed Career Criminal Act, the phrase "violent felony" is not limited to crimes in which violence actually occurs; instead, the phrase is defined to include inter alia any crime punishable by imprisonment for a term exceeding one year that is burglary, arson or extortion or otherwise involves conduct that presents a serious potential risk of physical injury to another. *18 U.S.C.S. § 924*(e)(2)(B)(ii). The United States Supreme Court holds that Congress intended "burglary" to mean any crime under state law, however denominated, that incorporated the elements of what the Supreme Court

describes as "generic burglary"--unlawful entry into a building or other structure, with intent to commit a crime.

Criminal Law & Procedure: Accusatory Instruments: Informations
Criminal Law & Procedure: Accusatory Instruments: Complaints
[HN3] The "complaint" under Massachusetts criminal procedure is the final step in the charging process, roughly equivalent to a federal information. Issued by a magistrate, the complaint is based on a complaint application normally filed by a police officer and likely to incorporate or be accompanied by a police report. The application is customarily sworn and is automatically given to defendants at their arraignments. *Mass. Gen. Laws ch. 276, § 22* (2000). Courts in Massachusetts can presume that defendants know the information contained in police reports.

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
[HN4] With regard to the offense of burglary, where the statute embraces two different crimes or categories of criminal conduct, the defendant will be deemed guilty of a violent felony if one of the two corresponds to generic burglary and that is the crime of conviction in the particular case.

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
Criminal Law & Procedure: Sentencing: Sentencing Ranges
[HN5] Under Taylor, a burglary conviction by a jury would count as a crime of violence under the Armed Career Criminal Act if the indictment and instructions made clear that the burglary was of a house. The same would be true if instead the defendant pled guilty to such indictment naming a house as the burgled location. It would also be true even if the indictment were silent as to the venue so long as the case files showed that the plea was to burglary of a house.

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
Criminal Law & Procedure: Sentencing: Criminal History: Prior Felonies
Criminal Law & Procedure: Sentencing: Sentencing Ranges
[HN6] With regard to whether a prior conviction for burglary qualifies as a violent felony for purposes of the Armed Career Criminal Act, the United States Court of Appeals for the First Circuit believes it is appropriate for the sentencing court to look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested (in this context) in the violent or non-violent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime (building), rather than the generically non-violent crime (vehicle) was at issue.

Criminal Law & Procedure: Sentencing: Criminal History: Prior Felonies
Criminal Law & Procedure: Sentencing: Sentencing Ranges
[HN7] With regard to whether a prior conviction qualifies as a violent felony for purposes of the Armed Career Criminal Act, the United States Court of Appeals for the First Circuit has approved resort to pre-sentence reports but only to determine the character of the criminal offense for which the defendant was convicted (not whether violence was or was not used on the particular occasion), where that determination cannot be made from the statutory language itself or from the charging documents, and only where the report was sufficiently reliable on this issue.

COUNSEL: Cynthia A. Young, Assistant United States Attorney, with whom Michael J. Sullivan, United States Attorney, was on brief for appellant.

Linda J. Thompson, with whom John M. Thompson and Thompson & Thompson, P.C. was on brief for appellee.

JUDGES: Before Boudin, Chief Judge, Torruella and Lipez, Circuit Judges.

OPINIONBY: BOUDIN

OPINION: **[*309]** BOUDIN, Chief Judge. [HN1] Under the amended Armed Career Criminal Act ("the Act"), *18 U.S.C. § 924(e) (2000)*, a 15-year mandatory minimum sentence is required for anyone convicted as a felon in possession of a firearm who has three or more prior convictions for a "violent felony" or "serious drug offense." This appeal by the government concerns the proper application of these labels to Reginald Shepard's prior guilty pleas under state burglary statutes. The issue is a recurring one.

On March 3, 1999, Shepard pled guilty to a charge of violating the federal statute prohibiting a felon from possessing a firearm, *18 U.S.C. § 922(g)(1) (2000)*. Shepard had in fact sold a Glock 17, 9 mm pistol**[**2]** and ammunition to an undercover federal agent at South Station in Boston. Shepard already had on his record dozens of prior state convictions, including eleven for breaking and entering. The government sought to have Shepard sentenced as an armed career criminal, arguing

that at least five of these breaking and entering convictions were violent felonies under the Act.

[HN2] Under the Act, the phrase "violent felony" is not limited to crimes in which violence actually occurs; instead, the phrase is defined to include inter alia "any crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson or extortion . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another." *18 U.S.C. § 924(e)(2)(B)(ii)*. In *Taylor v. United States, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990)*, the Supreme Court held that Congress intended "burglary" to mean any crime under state law, however denominated, that incorporated the elements of what the Court described as "generic burglary"--unlawful entry into "a building or other structure, with intent to commit a crime." *Id. at 598-99.*[**3]

At Shepard's initial sentencing, the five convictions at issue were under one or the other of two Massachusetts statutes that forbid breaking and entering a "building," "ship," "vessel" or "vehicle" with intent to commit a felony. n1 In each of the state cases, the complaint merely charged Shepard in the boilerplate language of the statutes, leaving it unclear just what kind of structure Shepard had entered. Thus, the complaints alone did not reveal whether Shepard had broken into a building or some lesser enclosure such as a car or boat.

----------Footnotes----------

n1 One of the statutes says "motor vehicle" instead of "vehicle" but otherwise they are similar; the difference between them is that one statute, *Mass. Gen. Laws ch. 266, § 16 (2000)*, is directed to breaking and entering by night and carries a 20 year maximum, while the other, *ch. 266, § 18*, has only a 10 year maximum and embraces breaking and entering during the day as well as non-forcible entry into a dwelling at night.

----------End Footnotes----------

[HN3] The "complaint" under Massachusetts[**4] procedure is the final step in the charging process, roughly equivalent to a federal information. 1 Massachusetts Criminal Practice § 4.1-4.2 (1998). Issued by a magistrate, the complaint is based on a [*310] complaint application normally filed by a police officer and likely to incorporate or be accompanied by a police report. Id. The application is customarily sworn and is automatically given to defendants at their arraignments. *Mass. Gen. Laws ch. 276, § 22 (2000)*; Super. Ct. Standing Order 2-86; 1 Massachusetts Criminal Practice § 4.2, 16.5(C). Courts in Massachusetts can presume that defendants know the information contained in police reports. See *Commonwealth v. Brown, 51 Mass. App. Ct. 702, 748 N.E.2d 972, 981 (Mass. App. Ct. 2001)*.

Forewarned by an earlier decision of this court, *United States v. Dueno, 171 F.3d 3 (1st Cir. 1999)*, the government secured the state court files from Shepard's earlier convictions, presented certified copies, and argued that the complaint applications and police reports contained in the state court files showed that Shepard's prior convictions were for entries into buildings[**5] and so constituted generic burglaries under Taylor. Taking these documents at face value, they showed (with varying degrees of elaboration) the following as to the charges that had led to Shepard's guilty pleas:

May 1989. Break in at 30 Harlem St. in Boston; defendant discovered by an inhabitant in the pantry. March 1991. Entry into 550 Arsenal St in Watertown; defendant in back room of store. July 1991. Entry into 258 Norwell St. in Boston; defendant found in hallway with property taken from a broken-into apartment. February 1994. Attempted entry into 145 Gallivan Blvd; defendant found with arms through broken glass window. n2

----------Footnotes----------

n2 At the first sentencing hearing the government argued that Shepard's conviction for an April 1989 break in to Crispus Attucks Children's Center building should also be counted as generic burglary. Since the government did not provide the police reports or complaint applications for this conviction, only the PSR, it simplifies our analysis if we ignore this conviction for the present case.

----------End Footnotes----------

[**6]

The district court ruled that the complaint applications and police reports could not be considered and declined to sentence Shepard under the Act, imposing instead a sentence of 46 months (which included a two-level upward departure). *United States v. Shepard, 125 F. Supp. 2d 562, 572 (D. Mass. 2000)* ("Shepard I"). On the government's appeal, this court reversed, ruling that there was no "absolute bar" to consideration of police reports and complaint applications; the question, said the panel, was whether, in the contemporaneous understanding of the state and the defendant, Shepard had pled guilty in the breaking and entering cases to entry of a building (rather than, say, a motor vehicle). *United States v. Shepard, 231 F.3d 56, 67 (1st Cir. 2000)* ("Shepard II"), cert. denied *534 U.S. 829, 151 L. Ed. 2d 37, 122 S. Ct. 72 (2001)*.

On remand, the government filed additional complaint applications or police reports from state court files evidencing two additional convictions. According to these documents, one conviction was for a February 1981 break in to the Jamaica Plain High School gymnasium and the theft of property; the[**7] other was an attempted break in at 446 Shawmut Avenue where Shepard was found on the fire escape next to a window that had been pried open with a knife.

Shepard submitted an affidavit saying essentially the same thing as to all of the alleged predicate charges:

I am sure that, at the time of [the state court plea hearing], the judge did not read this Incident report to me and did not ask me whether or not the information [*311] contained in the incident report was true. I did not admit the truth of the information contained in the Incident report as part of my plea and I have never admitted in court that the facts alleged in the reports are true.

After these submissions, the district court imposed the same sentence as before. *United States v. Shepard, 181 F. Supp. 2d 14, 18 (D. Mass. 2002)* ("Shepard III"). The court emphasized Shepard's affidavit denials that he had ever admitted in court the underlying facts of the crimes and concluded that "the police reports did not provide reliable evidence on the central question, what did the defendant plead to in the state court?" *Id. at 17, 19-20.* The government again appeals, arguing[**8] that complaint applications and police reports establish that Shepard pled guilty to breaking into buildings.

There is surely an air of make-believe about this case. No one, and this includes Shepard and the district court, has seriously disputed that Shepard in fact broke into half a dozen or more buildings and was consequently convicted upon pleas of guilty under the two Massachusetts statutes in question. Further, his string of convictions--which the district court described as "an 18-year crime spree," *Shepard I, 125 F. Supp. 2d at 565*--shows that he is just the kind of burglar whom Congress had in mind in adopting the tough 15 year minimum sentence for armed career criminals. Taylor recounts in numbing detail the legislative history showing Congress' aim to apply the Act to repeat burglars later convicted of a gun crime. *Taylor, 495 U.S. at 581-90.*

Congress' rationale was that a large percentage of all crimes are committed by repeat offenders; that many of these crimes have at least a potential for violence (e.g., the burglar who encounters a resident in the house being burgled); that after a series of these crimes, the defendant[**9] is fairly described as a repeat offender; and that when a repeat offender then also commits a federal gun crime, it is time for that felon to serve a long prescribed minimum sentence. *Taylor, 495 U.S. at 581-88.* Whatever the force of the theory, there is no doubt that Congress intended that it be implemented.

Yet Taylor, while construing the term "burglary" broadly (based on common usage rather than common law), narrowed the Act dramatically in another respect. Partly for practical reasons of administration, Taylor forbade a de novo inquiry by the sentencing court into what conduct the defendant actually engaged in incident to the predicate offense, and focused instead on whether the crime of conviction was necessarily a generic burglary (or some other crime of violence). *Taylor, 495 U.S. at 599-602.* Admittedly, this simplifies administration if the state statute describes generic burglary and nothing else.

The problem--which Taylor recognized and addressed--is that state burglary statutes are often drafted to embrace both conduct that does constitute generic burglary and conduct that does not (e.g., building versus[**10] vehicle n3). *Taylor, 495 [*312] U.S. at 599-602.* Taylor makes clear that [HN4] where (as here) the statute embraces two different crimes or categories of criminal conduct, the defendant will be deemed guilty of a violent felony if one of the two corresponds to generic burglary and that is the crime of conviction in the particular case. *Id. at 602.*

----------Footnotes----------

n3 Breaking and entering a vehicle is not generic burglary under Taylor's definition. *495 U.S. at 598-99*. Our circuit has never squarely decided whether burglary of vehicles or boats might still be grounds for enhancement under the Act because they "involve[] conduct that presents a serious potential risk of physical injury to another." *18 U.S.C. § 924(e)(2)(B)(ii)*, although prior dicta have suggested that they do not qualify as violent felonies, see, e.g., *Shepard II, 231 F.3d at 59*. Since the parties do not dispute this point, we assume it for present purposes, reserving always the peculiar problems posed by houseboats and camper vans, see *United States v. Peterson, 233 F.3d 101, 110 (1st Cir. 2000)*; *United States v. Sweeten, 933 F.2d 765, 770-72 (9th Cir. 1991)*.

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[**11]

But how can one tell whether generic burglary was the crime of conviction if one does not look at what actually happened at the scene of the crime? Taylor said that the sentencing court can still look at the charging papers and jury instructions, which together may well identify the crime of conviction. *Taylor, 495 U.S. at 602*. The Court did not explicitly rule out attention to other court-related documents or say just how guilty pleas should be parsed. Until the Supreme Court addresses the open issues, we must use our own reasoning, keeping faith with our own prior precedents.

Let us start with basics. [HN5] Under Taylor, a burglary conviction by a jury would count as a crime of violence under the Act if the indictment and instructions made clear that the burglary was of a house. *Taylor, 495 U.S. at 602*. The same would be true if instead the defendant pled guilty to such indictment naming a house as the burgled location. n4 It would also be true, as this court held in *United States v. Harris, 964 F.2d 1234 (1st Cir. 1992)*, even if the indictment were silent as to the venue so long as the case files showed that the plea was to[**12] burglary of a house. *Id. at 1236-37*; accord *United States v. Coleman, 158 F.3d 199, 202-03 (4th Cir. 1998)*.

----------Footnotes----------

n4 All twelve circuits that have addressed the issue have agreed that Taylor analysis applies after a guilty plea, even though Taylor only explicitly explained how to resolve ambiguity when the prior convictions were obtained after jury trials. See *United States v. Adams, 91 F.3d 114, 116 (11th Cir. 1996)* , cert. denied *519 U.S. 1047, 136 L. Ed. 2d 546, 117 S. Ct. 623 (1996)* (collecting and joining decisions from the 1st, 5th, 6th, 7th, 8th, 9th, and 10th *Circuits)*; *United States v. Hernandez, 218 F.3d 272, 278 (3rd Cir. 2000)*; *United States v. Hill, 327 U.S. App. D.C. 402, 131 F.3d 1056, 1064 (D.C. Cir. 1997)* (applying parallel U.S.S.G. career criminal provision); *United States v. Palmer, 68 F.3d 52, 59 (2nd Cir. 1995)*; *United States v. Cook, 26 F.3d 507, 509* & n.5 (4th Cir. 1994).

----------End Footnotes----------

[**13]

In Harris, Judge (now Justice) Breyer discussed the exact situation before us: a defendant who has pled guilty to violating a broadly worded statute that included both situations that would and situations that would arguably not be violent felonies. *Harris, 964 F.2d at 1236-37*. As with Shepard's complaint, the indictment in Harris repeated the statutory boilerplate, leaving it unclear what category of offense was at issue. *Id.* The Harris court explained:

> In such a case, we [HN6] believe it would be appropriate for the sentencing court to look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested (in this context) in the violent or non-violent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime ("building"), rather than the generically non-violent crime ("vehicle") was at issue.
>
> *Id. at 1236.*

Judge Breyer then described the presentence report's summary of the case files from Harris's state convictions; these files (just like the complaint [**14]applications and police reports in Shepard's case) made clear that the crimes were violent felonies-- [*313] in Harris, that the defendant had twice physically assaulted the victim. *Harris, 964 F.2d at 1236-37*. On this basis alone, this court concluded that Harris's prior convictions were properly treated as violent felonies and (together with a third crime of violence) justified the 15 year minimum sentence prescribed by the Act. *Id. at 1237*.

In *United States v. Dueno, 171 F.3d 3 (1st Cir. 1999)*, this court arguably limited Harris in one respect. In Dueno, the government sought to characterize the predicate guilty pleas based not on the original police reports in the state court case files but rather upon the federal presentence report's description of the underlying criminal conduct. *Id. at 6-7*. This had also been true in Harris but there no one had contested the reliance on the PSR. In Dueno, the court--though describing the issue as a close one-- declined to allow the PSR alone to resolve the issue. *Id. at 7*.

The Dueno court endorsed Harris's general approach--as it had[**15] to do absent en banc review, see *Irving v. United States, 162 F.3d 154, 160 (1st Cir. 1998)* (en banc), cert. denied *528 U.S. 812, 145 L. Ed. 2d 41, 120 S. Ct. 47 (1999)*--but it noted that not a single document from the original state court case files had been submitted for consideration, nor was there any other "account of what took place at Dueno's plea hearing." *Dueno, 171 F.3d at 7*. Absent any indication that the PSR accurately repeated the information from the original state court documents, the Dueno court rejected reliance on the PSR's description of the criminal conduct to rescue an enhanced sentence whose primary ground was admittedly in error. Id.

Our en banc court sought to clarify our stance on presentence reports in a published order released shortly after Dueno. n5 We explained:

> Our cases [HN7] have approved resort to pre-sentence reports but only to determine the character of the criminal offense for which the defendant was convicted (not whether violence was or was not used on the particular occasion) [citing Harris], where that determination cannot be made from the statutory language[**16] itself or from the charging documents, and only where the report was sufficiently reliable on this issue [citing Dueno].

United States v. Sacko, 178 F.3d 1, 7-8 (1st Cir. 1999) (en banc order, June 16, 1999). While this order does not spell out what makes a PSR "reliable," and other circuits are split on this issue, compare *United States v. Adams, 91 F.3d 114, 116 (11th Cir. 1996)* (relying on PSR), with *United States v. Potter, 895 F.2d 1231, 1238 (9th Cir. 1990)*, cert. denied *497 U.S. 1008, 111 L. Ed. 2d 757, 110 S. Ct. 3247 (1990)* (generally rejecting PSR), it does make clear two things: first, presentence reports can be used in some situations; second, Harris remains solid precedent in this circuit even after Dueno.

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n5 This order was in response to the government's motion for a rehearing en banc in *United States v. Sacko, 178 F.3d 1, 7 (1st Cir. 1999)*. Sacko was released three days before Dueno and was arguably in tension with the later opinion. Since the Sacko panel released an erratum altering the language in Sacko, our court denied the petition for rehearing, but took the opportunity "to make clear the en banc court's view as to what is now settled law in this circuit." *Sacko, 178 F.3d at 7*.

----------End Footnotes----------

[**17]

In Shepard's case the reliability of PSR descriptions is not even an issue, for the government secured the original state court case files from six of Shepard's prior convictions, found in them the complaint applications and police reports that had prompted the complaints, and made the latter available to the federal sentencing [*314] court (and so also to us). And Shepard has been given a full opportunity (by the remand in Shepard II) to explain any circumstance surrounding the pleas that might defeat the natural inference that the pleas were to the crimes described in the case files.

Of course, it is barely possible that someone in Shepard's position might have pled guilty, not to the charge that underlay the complaint (namely, burglary of a building), but to the burgling of some other venue such as a boat arguably not within the definition of generic burglary. Conceivably, at the plea hearing someone might have explained in mitigation that 258 Norwell Street was actually a boat dock address or, in a different instance, that Shepard's target was not the Jamaica Plain High School gymnasium but merely a car parked in front.

This, we say, is conceivable but highly unlikely; and it[**18] is even less likely--to the point of nearly impossible--that it or anything like it happened for most of Shepard's predicate pleas, and that the police reports were mistaken as to venue for four or more of the six

crimes. Nor on remand did Shepard offer any evidence that this had happened; he said only that he had not specifically admitted in open court to breaking into houses and that the underlying police reports were not read to him at the plea hearings.

Against this background, it is "clearly erroneous" to find that Shepard did not plead guilty to at least three burglaries of buildings. Absent other evidence of peculiar circumstances, there is a compelling inference that the plea was to the complaint and that the complaint embodied the events described in the application or police report in the case file. If there were countervailing evidence to defeat the inference, we would defer to any reasonable interpretation of the conflict by the trier of fact. But there is no other evidence, nor is it easily imaginable that there would be.

In Harris Judge Breyer referred to what the government and defendant "believed" to be the subject of the predicate plea; but he did not suggest **[**19]**that this required direct evidence of the parties' subjective states of mind. *Harris, 964 F.2d at 1236*. His concern was with the nature of the proceedings: in upholding the enhancement Harris relied on objective evidence to characterize the pleas--namely, on police reports in the case file. Unimpeached, those files carried the day in Harris; they do so here as well.

Our view accords with that of the Fourth Circuit in *Coleman, 158 F.3d at 202-03*. In Coleman, the en banc court approved consideration of the "statement of charges" filed by a "complaining witness"--Maryland's equivalent of Massachusetts's complaint application--in order to determine whether the predicate crime qualified under the Act. *Id.* While the Coleman court mentioned that this document was formally considered part of the "charging papers" under Maryland law, we do not see how the label given to the document should make a difference, particularly in light of Taylor's forceful rejection of the use of state labels. *Taylor, 495 U.S. at 590-92*.

Judged by what Congress wanted, this case is not a close call. If this court's precedents have confused**[**20]** matters, that is our own fault but it is no reason to perpetuate confusion. *Harris*, with the reliability qualification adopted by *Dueno* as to the PSR (a point not litigated in Harris and irrelevant here), is the law of this circuit until the Supreme Court or an en banc panel rules otherwise. n6 On remand, the **[*315]** district court must sentence Shepard under the Act and apply the mandatory minimum prescribed by Congress.

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n6 In addition to the tension between the two decisions, our own prior remand in Shepard II may further have complicated matters by not calling attention to the en banc order in Sacko. In all events, none of this confusion is the fault of the district judge who sought conscientiously to carry out this court's earlier mandate.

----------End Footnotes----------

The sentence of the district court is vacated and the matter remanded for re-sentencing in conformity with this decision.

UNITED STATES OF AMERICA v. REGINALD SHEPARD, Defendant.

Crim. No. 98-10262-NG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

181 F. Supp. 2d 14; 2002 U.S. Dist. LEXIS 1280

January 23, 2002, Decided

SUBSEQUENT HISTORY: *Vacated by, Remanded by United States v. Shepard, 2003 U.S. App. LEXIS 22584* (1st Cir. Mass., Nov. 3, 2003)
PRIOR HISTORY: *United States v. Shepard, 125 F. Supp. 2d 562, 2000 U.S. Dist. LEXIS 20106 (D. Mass. 2000) United States v. Shepard, 125 F. Supp. 2d 562, 2000 U.S. Dist. LEXIS 20106* (D. Mass., 2000)
DISPOSITION: On remand original sentence re-imposed.

CORE TERMS: colloquy, police report, breaking, pled, sentence, felony, sentencing, predicate, convicted, charging, presentence report, pled guilty, enhancement, vessel, burglary, violent, ship, criminal history, intent to commit, violent crime, categorical, departure, reliable, process, door, guilty plea, proceeding, generic, plainly, plea agreement

COUNSEL: **[**1]** For REGINALD SHEPARD, Defendant: Linda J. Thompson, Jacobson & Thompson, P.C., Springfield, MA.

U. S. Attorneys: Nadine Pellegrini, United States Attorney's Office, Boston, MA.

JUDGES: NANCY GERTNER, U.S.D.J.

OPINIONBY: NANCY GERTNER

OPINION: **[*15]** MEMORANDUM RE: RE-SENTENCING

January 23, 2002

On July 14, 1999, I sentenced Reginald Shepard to 46 months in prison after he pled guilty to a violation of *18 U.S.C. § 922*(g) (felon in possession of a firearm). n1 With a criminal history of VI, the presentence report ("PSR") calculated Mr. Shepard's sentencing guideline range to be 30 to 37 months.

n1 Under *18 U.S.C. § 922*(g)(1) ("§ 922 (g)(1)"), it is unlawful for a person who has been convicted previously of a felony to possess a firearm.

The government moved for two enhancements: First, it sought an enhancement to a 15 year mandatory minimum term under the Armed Career Criminal Act ("ACCA") *18 U.S.C. § 924*(e) **[*16]** ("§ 924(e)"). n2 I rejected that enhancement **[**2]** on the grounds that Mr. Shepard's conviction history did not meet the statutory requirements. I concluded that on the record before me, I could not determine that he had at least "three prior convictions . . . for a violent felony or serious drug offense" within the meaning of the statute. *18 U.S.C. § 924*(e) and U.S.S.G. § 4B1.4.

n2 A defendant convicted for a violation of § 922(g)(1) is subject to the sentence-enhancement provision at issue, § 924(e):

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court . . . for a violent felony or a serious drug offense, or both . . . such person shall be fined not more than $25,000 and imprisoned not less than fifteen years. . . .

(2) As used in this subsection -- . . .

(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that --

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

[3]**

Shepard was charged with the crime of breaking and entering under *Mass. Gen. L. Ch. 266 § 16*, which outlines a generic breaking and entering offense,

including offenses that qualify as predicate convictions under the ACCA, *Taylor v. United States, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990)*, namely, breaking and entering into a building, and offenses that do not, namely breaking and entering a car or vessel. While police reports attached to the applications for state criminal complaints suggested that at least five of Mr. Shepard's convictions involved a building, those details were not reflected in the complaints themselves. Rather, the complaints tracked the boilerplate language of the statute. Mr. Shepard pled guilty to the complaints.

After ruling against applying the ACCA enhancement, I invited the government to move for an upward departure on the ground that the criminal history score of VI did not adequately reflect the seriousness of Mr. Shepard's criminal history. Since it was clear that Mr. Shepard's record justified an upward departure, I granted the motion.

The sentence which I imposed represented a two level upward departure, from a level **[**4]** 12 base offense level to a level 14, with 46 months being the highest sentence available in the range. My reasons are recorded in *United States v. Shepard, 125 F. Supp. 2d 562 (2000)* ("Shepard I").

The government appealed. The decision was then vacated and remanded in *United States v. Shepard, 231 F.3d 56 (1st Cir. 2000)*("Shepard II"). The First Circuit found that I had erred in two respects: First, Shepard I suggested that the trial court could never use police reports to determine the crime to which the defendant had pled (and therefore, the charge of which he was convicted). Second, Shepard I implied that in order for me to find that the defendant had admitted to the predicate offenses, at either the state plea colloquy or during the federal sentencing, the defendant had to admit to the offense explicitly ("in the sense of yes, I struck the victim in the face,'") *Shepard II, 231 F.2d at 66.* n3

n3 It was not my intent in Shepard I to imply either position although the decision could be fairly read to suggest these interpretations. I noted repeatedly that the ACCA's emphasis on convictions reflects a concern that facts which determine ACCA status had to have been litigated and subjected to the formalities of the criminal justice process before a defendant's sentence can be dramatically increased. While I confess to overstatement, what I meant by "the formalities" of the criminal justice process was that the ACCA's focus was on what the defendant had pled to or been convicted of, and not what he had actually done. (I noted that what the Taylor court described as the "categorical" approach, I was calling "focusing on the formalities of the record." *Shepard I, 125 F. Supp. 2d at 568.)*

[5]**

[*17] The court directed the consideration of police reports and complaint applications to determine if they "constituted sufficiently reliable evidence of the government and the defendant's shared belief that the defendant was pleading guilty to the unlawful entry of a building." *Shepard II, 231 F.3d at 70.* The court also directed a review of the defendant's submissions at sentencing to evaluate whether, under the circumstances, the defendant admitted that he had pled to the predicate offenses. *Id. at 66.*

At the first hearing on remand, I addressed two issues: First, what was the question to be answered on remand? Was it -- what did Mr. Shepard plead to? Or, was it -- what did Mr. Shepard do to provoke the charges? Both parties agreed that the answer was: What did Mr. Shepard plead to on those prior occasions? Second, with respect to that question, who bears the burden of proof? With some qualifications noted below, both parties agreed that the government bears the burden of proof.

I also considered on remand two types of questions raised by the court -- those which related to whether the police report was made part of, referred to, or used in any **[**6]** way in the plea colloquy n4 and those which related to whether Mr. Shepard admitted that he had pled to the predicate offenses. n5

n4 The Court noted: ". . . Did the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct? Where did the police reports come from? What took place at Shepard's plea hearings? More specifically . . . did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime?" *Shepard II, 231 F.3d at 68.*

n5 The Court noted: "Shepard's objections to the government's police reports and complaint applications might focus, for example, on any inconsistencies or ambiguities in their description of the defendant's conduct, or any circumstances relating to the creation or reproduction of the documents, that affect their usefulness for determining whether Shepard and the government both believed that an entry into a building was at issue when he entered the guilty pleas. *Shepard II, 231 F.3d at 69.*

181 F. Supp. 2d 14, *; 2002 U.S. Dist. LEXIS 1280, **

[7]**

After two hearings, myriad briefs, and additional submissions of the parties, I have evaluated the police reports and complaint applications as well as the defendant's affidavit. I concluded that the police reports did not provide reliable evidence on the central question, what did the defendant plead to in the state court? There is no evidence that the defendant and the government "shared [the] belief" that Shepard was pleading guilty to the unlawful entry of a building. *Shepard II, 231 F.3d at 66.*

As I describe below in greater detail, there was no transcript of the state plea colloquy, no presentence report containing the police reports, and no written plea agreement. The only account of the plea process that I have comes from the defendant's affidavit. The government offered no other version -- no account from the state prosecutor or any other participant, no recitation of whether it was "standard practice" of the judge to review the report in open court. The defendant indicated that the police reports were never read or mentioned at his plea colloquies. They **[*18]** were never made a part of the plea process at all, either by way of exhibit or orally. Furthermore, **[**8]** Mr. Shepard points to instances in which the reports were vague or obviously based on hearsay.

Apart from the state plea colloquy, nothing the defendant said at the instant sentencing hearing or in his various court submissions qualifies as an admission that he had in fact pled to the crime of breaking and entering into a building in state court.

While I could not conclude by a fair preponderance of the evidence that Mr. Shepard had pled to the qualifying crimes of violence, I reiterated my conclusion that an upward departure was appropriate. Mr. Shepard's criminal history score, I found, understated the seriousness of his record under U.S.S.G. § 4A1.3, p.s. As a result, I reimposed the original sentence.

I. FACTS

Mr. Shepard pled guilty to a number of state offenses; at least five have been cited by the government as predicate offenses to ACCA. In each case, the state complaints tracked the Massachusetts statute (*Mass. Gen. L. Ch. 266 § 16*, 18,) n6 a statute which includes breaking and entering into a building as well as breaking and entering into a ship, vessel or vehicle. Case law under the ACCA identifies only breaking and entering into a building or other structure **[**9]** with intent to commit a crime as a crime of violence under the ACCA. *Taylor v. United States, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990).* In contrast, breaking and entering into a ship, vessel or vehicle is not a crime of violence under the ACCA. Id.

n6 The relevant statutes provide:

Section 16:

Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished by imprisonment in the state prison for not more than twenty years, or in a house of correction for not more than two and one half years.

Mass. Gen. L. Ch. 266 § 16 (2000).

Section 18:

Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years.

Mass. Gen. L. Ch. 266 § 18 (2000). The statute was amended in November 1989 to include the "or motor vehicle" language.

[10]**

The government introduced certified copies of police reports related to four offenses. In some instances, these reports were made part of applications for complaints. Significantly, the complaints themselves did not reflect the information contained in the reports on the issues relevant to this case; in each case, the complaints just tracked the boilerplate language of the statute. n7

n7 The reports were as follows:

(1) May 1989 Boston Police Report (paragraphs 58, 59 of the PSR):
Responded to R.C. [radio call] to 30 Harlem St. for B & E in progress. On arrival observed cellar door in rear had been broken down. Spoke to victim who [said] she heard noises downstairs. She then observed suspect described above in her pantry

Consistent with the police report, the complaint application states that the defendant was charged with "breaking and entering night" and that the property stolen or destroyed was a "cellar door." But the complaint itself says only that, on 5/6/89, the "defendant did break and enter in the night time, the building, ship, vessel or vehicle, the property of Jerry Cothran, with intent to commit a felony therein."

(2) March 1991 Watertown Police Report (paragraphs 68, 69 of the PSR):
In reference to . . . a B & E & L from the FRETTERS store . . . reported on 3-11-91 the following is submitted: A follow-up investigation revealed that while the manager . . . and the assistant Manager . . . were in the back-room to the above business [sic] . . . they observed the back door open and observed a former employee, Reginal [sic] Shepard . . . enter the room. Upon seeing the two managers, the suspect Shepard ran from the room in a northerly direction out the parking lot towards Arsenal street . . . According to both employee's [sic] this door was locked and the only way in was with a key which they suspect Shepard had in his possession.

After the incident, the managers did an inventory and found certain equipment missing.

The complaint states that on 3/11/91, the defendant did break and enter in the night time, the building, ship, vessel or vehicle, the property of Fretters, with intent to commit a felony therein.

3) July 1991 The Boston Police Report (paragraphs 70-71of the PSR):
Officers . . . responded to a radio call for an S/P wearing red shorts and blue shirt in the hallway of 258 Norwell Street. Upon arrival observed S/P (described above) walking away from above address . . . carrying a pink pillowcase . . . found pillowcase to contain property listed above . . . Officers checked bldg and found a panel on 3d floor front door had been broken in exposing inside door lock. When the officers entered the living room, they 'observed, in living room, areas where V.C.R. and phone were taken from' . . . also observed in bedroom one pink pillowcase missing from pillow.

The complaint application states the defendant is charged with "b/e daytime" and the place is "258 Norwell St." The complaint, however, states that on 7/18/91, "the defendant did break and enter in the day time the building, ship or vessel of Monica Collins with intent to commit a felony therein."

4) February 1994 Boston Police Report (paragraphs 70-77 of the PSR):
Responded to R/C [radio call] for a black male going door to door asking for an unk. person . . . [Witness said suspect] went next door to # 145 Gallivan and was observed by the witness attempting to gain entry by turning several door knobs . . . Officer . . . went to the rear of the property and suspect was observed with both arms through the glass partition (Glass to door was shattered) attempting to gain entry to the second door (near basement.)

The complaint application charges the defendant with "breaking and entering," and "wilful malicious destruction of personal property," at 145 Gallivan Blvd. The complaint stated, "on 2/3/94 the defendant did break and enter in the day time, the building, ship or motor vehicle or vessel of Russell McGaugh with intent to commit a felony therein."

5) April 1989 (Paragraphs 53-55 of the PSR: The complaint application suggested that the defendant broke into the Crispus Attucks Children's Center by breaking a window and did put the Director the Center in fear and did take baby food, and certain equipment.

The complaint however, states that on 4/2/89, "the defendant did break and enter in the daytime, the building, ship, or vessel of Crispus Attucks Children's Center with intent to commit a felony therein."

[11]**

[*19] Mr. Shepard filed an affidavit on remand. n8 His affidavit focused on each of the police reports, which he reviewed one by one. He indicated that none of the details in these reports were ever mentioned at his pleas. Moreover, he indicated that the reports themselves were never read by the judge to him during the plea colloquy; nor was he ever asked if the information contained in the Incident Reports were true. He noted further that parts of the reports were ambiguous and based on hearsay. n9 He added with respect **[*20]** to each report: "I did not admit the truth of the information contained in the Incident Report as part of my plea and I have never admitted in court the facts alleged in the report are true."

n8 At the initial sentencing, the defendant objected to the "recitation of alleged factual information drawn from sources such as police reports and complaint applications," citing Taylor. On remand he submitted an affidavit, described above.

n9 With respect to the Watertown report, Shepard notes that part of the report is based on the hearsay statements of two employees (that a certain door was locked and "the only way in was with a key they suspect Shepard has in his possession", and that they "believe" upon Shepard's termination he "never turned his stores keys into [sic] the manager.") The employees did not see Shepard take anything; it was only after an inventory that they realized certain things were missing.

[12]**

No transcript of the plea colloquy was offered for any of the pleas cited by the government. The government represented that none was available. Likewise, no one offered any presentence reports which might have contained a police report or written plea agreements. There was no evidence suggesting that the police reports had ever been made part of the plea colloquy, in writing or orally. n10

n10 A word about plea colloquies in the courts of Massachusetts: The defendant pleads guilty and is usually sentenced immediately. A presentence report is made available only if either party moves for it. See Mass. R. Crim. P. 12. There are rarely written plea agreements.

Apart from Mr. Shepard, no witness described what had occurred at the plea colloquy -- no police officers, prosecutors or attorneys. In short, no document was offered rebutting Mr. Shepard's account of what went on. n11

n11 In *Commonwealth v. Quinones, 414 Mass. 423, 608 N.E.2d 724 (1993)* for example, a defendant filed a motion to withdraw his plea on the grounds that it was not a knowing and voluntary waiver of his constitutional rights. No transcript of the earlier plea colloquy was available. The vehicle containing the stenographic notes of the court reporter had been stolen. The trial judge denied the motion based on his "practice" in taking and accepting pleas of guilty and his "memory" of the proceedings. *Id. at 424.* The Supreme Judicial Court of Massachusetts affirmed on the ground that "if the record is unavailable, it may be reconstructed through testimony or other suitable proof of what happened in court when the guilty plea was taken." *Id. at 432.*

[13]**

II. ANALYSIS

A. The Question to Be Answered on Remand Is: What Did Mr. Shepard Plead To?

The question on remand, and indeed, the central question under the ACCA is: What did Mr. Shepard plead to? As the First Circuit noted, the question is "not what Shepard did to provoke the criminal charges to which he pled guilty." *Shepard II, 231 F.3d at 68.* n12

n12 The First Circuit's question mirrors that of the Supreme Court in Taylor. The question in Taylor was, "whether, in the case of a defendant who has been convicted under a nongeneric - burglary statute [e.g. one that includes places, such as automobiles and vending machines, other than buildings], the government may seek enhancement on the ground that he actually committed a generic burglary." *Taylor, 495 U.S. at 599-600* (emphasis added). The Court answered: "No." The categorical approach of Taylor looks to what the defendant was convicted of, not what he did.

I will briefly review the ACCA **[**14]** case law and statutory language for two purposes -- to put the government's arguments in context and to demonstrate the ways in which the government's approach would require me to do precisely what Taylor and its progeny forbid.

The ACCA imposes a mandatory sentence of at least fifteen years, and up to life imprisonment for illegal possession of a firearm, by anyone who has three prior convictions for violent felonies or serious drug offenses. The linchpin is the word "conviction." While some judges believed that the "mere" fact of three prior felonies, without more, was not enough to make a career criminal, and hesitated or even refused to send the defendant to jail on that score alone, n13 the language of the Act and **[*21]** its legislative history was clear: Judges applying the ACCA should confine their identification inquiry to the conviction record - the number, type and timing of prior convictions. See James E. Hooper, Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act, *89 Mich. L. Rev. 1951, 1967 (1991)*("The ACCA contemplates an examination of the conviction record, and little else.") The Supreme Court reaffirmed this in *Taylor v. United States, 495 U.S. 575, 602, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990)*: **[**15]** "We think the only plausible interpretation of [the ACCA] is that . . . it generally requires the trial court to look only to the fact of conviction and that statutory definition of prior offense." n14 Calling the methodology the "categorical approach," *495 U.S. at 602*, the Court cautioned the judge against becoming embroiled in a "daunting" factual inquiry about what had actually happened at the

time of the state offense, n15 particularly where the state offenses occurred some time ago. *Taylor, 495 U.S. at 600.* The aim was only to look to the "charging documents," not "plunge into the details of a particular defendant's conduct." *Shepard II, 231 F.3d 56, 65* (citing *United States v. Winter, 22 F.3d 15, 19 (1st Cir. 1994)).*

n13 See, *United States v. Wicks, 833 F.2d 192, 195 (9th Cir. 1987),* cert. denied, *488 U.S. 831, 102 L. Ed. 2d 63, 109 S. Ct. 87 (1988)*(Pregerson, J., dissenting)("I would . . . hold that something more than three convictions is required . . . Here, where two of the three convictions stemmed from burglaries that occurred on the same night, I would hold that [the ACCA] was not intended to, and therefore does not, apply."); *United States v. Balascsak, 873 F.2d 673, 683-84 (3d Cir. 1989).* (Becker, J. concurring) (refusing to enhance the sentence unless the conviction history showed "the crimes (and the episodes of which they were a part) were truly separate").

[16]**

n14 This focus on convictions and the statutory offense definitions under the ACCA is notably different from the methodology for determining criminal history departures under the chapter 4 of the Sentencing Guidelines. Recognizing the inadequacies of the criminal history scoring system, the Sentencing Commission encouraged departures in broad terms -- where "reliable information" indicates that the criminal history category "significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." U.S.S.G. § 4A1.3, p.s. "Reliable evidence" can include prior sentences that were not counted in the score, as well as "prior similar adult criminal conduct not resulting in a criminal conviction." Id. Police reports may well be an important source of "reliable information" for such departures. As I noted in *United States v. Footman, 66 F. Supp. 2d 83, 93 (D. Mass. 1999),* aff'd. *United States v. Footman, 215 F.3d 145 (1st Cir.2000),* however, the "reliable information" of "prior similar conduct" raises serious problems of its own.

n15 Indeed, the legislative history reflects a concern about broadening the inquiry beyond the conviction record. While some believed a record of conviction might predict recidivism, other factors which a court might take into account were less clear. Hooper, Bright Lines, Dark Deeds, *89 Mich. L. Rev. at 1963-64.*

[17]**

Where, as here, the state statute to which the defendant pled guilty did not track the federal definitions under the ACCA, the court was obliged to dig further. Nevertheless, the First Circuit has been clear about the limitations of "the dig": The judge may not hold a mini-trial on the particular facts underlying the prior offense, but he or she may "peek beneath the coverlet" of the formal language to ascertain whether the conviction was for a non-violent or a violent crime. *Dueno, 171 F.3d 3, 5 (1st Cir. 1999).*

B. The Government Bears the Burden of Proving What Mr. Shepard Pled To

Plainly, the government bears the burden of "proving the applicability of an upward adjustment under the guidelines **[*22]** [or the ACCA]," *Shepard II, 231 F.3d at 69* (citing *United States v. Dueno, 171 F.3d 3, 7 (1st Cir. 1999)),* and thus, reconstructing the record. If the record is ambiguous, if it does not allow me to say one way or the other what Mr. Shepard agreed to plead to, then the enhancement should not apply.

The court's "peek beneath the coverlet" could involve one of three scenarios. If the defendant was convicted after a trial, the **[**18]** court is permitted to consider the jury instructions to understand what the plea consisted of. *United States v. Damon, 127 F.3d 139, 142 (1st Cir. 1997).* If a guilty plea, the court may review the plea colloquy. Id. Or the court may review the defendant's statements or pleadings to see if they comprise admissions that the prior pleas were pleas to the predicate ACCA offenses. *United States v. Harris, 964 F.2d 1234, 1236-37 (1st Cir. 1992).*

In this case, in order to decide what Mr. Shepard has pled to I must look in two directions: a) reconstructing the plea colloquy, and b) determining whether the defendant's responses (or failures to respond) to the PSR and the police reports attached thereto amount to an admission of the facts recited in the documents.

C. Reconstructing the Plea Colloquy

1. Relationship of Police Reports to the Plea Colloquy

The government offered certified copies of the police reports; at least five of these pleas, it suggested, were pleas to a crime of violence, breaking into a building.

The First Circuit has called for careful consideration of those reports. To the question, "may a sentencing court consider **[**19]** certified copies of police reports and complaint applications to determine whether a defendant pled guilty to three prior 'violent felonies' qualifying for sentence enhancement under the [ACCA]," *Shepard II, 231 F.3d at 58,* the answer was plainly, "yes."

But the reverse position, which the government seems to urge, is not appropriate -- that certified police reports are all that is needed, without proof that they were part of the plea colloquy, that they were exhibits to the colloquy, part of a plea agreement, or referred to by the judge or the prosecutor as part of the factual basis for the plea.

To be sure, the police reports offered by the government were certified. But certification established only that the document was an accurate copy of the police report. It does not answer the question: What did the defendant plead to? *Shepard II, 231 F.3d at 60 n.2.* Neither does the parties' concession that the police report accompanied the application for a complaint, which made it part of the charging documents. In order to have persuasive evidence of what Mr. Shepard plead to, the police reports must have had some tangible relationship to the plea **[**20]** colloquy. This conclusion is clear from the questions that the Court posed as examples of the kind of inquiries I should make on remand:

A) Did the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct?

B) What took place at Shepard's plea hearings?

C) Did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime?

[*23] D) Where did the police reports come from? n16 Shepard II, 231 F.3dd at 68.

n16 To be sure, this question, taken out of context as described below, might suggest that all the government has to do is prove that the report was an accurate copy of the original -- i.e., certify the report. As I suggest throughout, that interpretation of Shepard II would be inconsistent with the categorical approach. The police reports have relevance only insofar as they were part of the plea process or a federal presentence report to which the defendant did not adequately object.

[21]**

2. The Record: No Transcripts, State Presentence Reports, or Plea Agreements -- Only Shepard's Affidavit

A review of the plea colloquy would obviously enable me to reconstruct the plea and answer the relevant questions. If the police report had been offered as part of the plea, had been an exhibit to the plea colloquy, or had been orally recited as part of the factual basis of the plea, then I could conclude that Mr. Shepard adopted those facts.

The problem is that there is no record of the plea colloquy. There is no formal plea agreement (to which a police report might have been attached). There was no state presentence investigation which may have clarified the factual basis for this plea. There is no rebuttal offered by the government to Shepard's account of what went on during the plea colloquy.

The only account is Mr. Shepard's, and he insists that the police reports were never mentioned during his pleas. Mr. Shepard's affidavit states unequivocally that the police reports offered here were never made part of the plea colloquy, never explained to him, and never acknowledged by him to be accurate at that time or at any other.

3. The Government's Position Is **[**22]** Inconsistent with United States v. Harris, n17 United States v. Custis, n18 and United States v. Daniels. n19

n17 *964 F.2d 1234 (1st Cir. 1992).*

n18 *511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).*

n19 *532 U.S. 374, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001).*

Nevertheless, the government wants the Court to infer that Mr. Shepard pled guilty to the facts contained in the various reports. It suggests that if the police report recited certain facts, namely, what happened and where it happened, and the defendant did not specifically deny those facts, he "must have" pled guilty to them. Or, it implies, since the police report included those facts, it is reasonable for me to assume that everyone - defendant and government - "must have" shared the intent to plead guilty to them. How could Mr. Shepard have pled guilty to breaking and entering at all if he were not pleading to those facts, they suggest? What facts could he have reasonably contested?

These inferences are not only unwarranted in the record; they are troubling. **[**23]** Since I do not know the specifics of what Mr. Shepard actually did (in terms

of the crime), or what the state of the evidence against him was, or what other information the officers had, or what he was in a position to contest, in order to adopt the government's position, I would have to speculate about critical issues.

To take the facts as admitted in the police report because the defendant never specifically denied them during the plea would turn the plea process on its head. Mr. Shepard was never asked to deny or accept the facts that are of relevance to **[*24]** this federal proceeding. All that I can tell from the record is that he pled to the boilerplate complaint, phrased in terms of the general breaking and entering statute. As a matter of evidence law, this could hardly qualify as an admission. n20

> n20 The only "admissions" category relevant here would be an "admission by silence." These admissions are admissible on the theory that a person would protest the statement made in his presence if untrue. M. Graham, 3 Handbook of Federal Evidence § 801.21 (5th ed. 2001) (describing application of *Fed. R. Evid. 801(d)(2)*). Plainly, nothing that I know about Mr. Shepard's plea colloquy would justify such an inference.

[24]**

Indeed, the government's position is tantamount to placing the burden of proof on the defendant, and an extraordinary burden at that. He could dispel the inferences not by saying, "I did not plead to those details," as he has done, but only by saying, "I did not do this or that act as the police report says." n21

> n21 Even if I were to engage in the inquiry - the "must haves" that the government's analysis invites - I would conclude that these reports are sketchy, at best. With the sole exception of two of them (Watertown 1994, Boston 1991), they reproduce the hearsay accounts of witnesses on the scene.

Taylor expressly eschews such an approach - evaluating the actual course of conduct which triggered the criminal offense, making factual findings not necessarily ever made by the state court in federal court, and if the particular issues were not litigated in state court, litigating them in federal court. Indeed, the Court adopted the categorical approach even when it recognized the problem presented by the **[**25]** instant case -- when a defendant pleads guilty but no record of the plea survived colloquy. *Taylor, 495 U.S. at 601-2.*

Plea bargains affect guilty pleas that may or may not be on all fours with the charging documents; they are the product of strategic "bargains" after all, based on the sentence offered, the risks of trial, and the state of the evidence. As the Supreme Court noted, "In any case where the defendant pleaded guilty, there is often no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, non-burglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." *Taylor, 495 U.S. at 601-02,* cited approvingly in *Shepard II, 231 F.3d at 69-70.*

Other courts have confronted similar situations as the instant one and have rejected arguments similar to those made by the government. In *United States v. Shannon, 110 F.3d 382 (7th Cir. 1997),* the defendant pled to statutory rape, which could include either consensual intercourse or forcible rape of a minor. While the **[**26]** complaint contained details consistent with the latter, the information to which the defendant pled alleged only statutory rape. The Ninth Circuit looked to the information, holding that "the information was the basis of the conviction and sentence and all its allegations were admitted and must be deemed established, while the complaint contains factual allegations that are contested and would require an evidentiary hearing to confirm." *Id. at 384.* Likewise, in the instant case, I am obliged to review only the indictment, and not the application for the complaint or police reports not made part of the record.

Or, in the case of a jury trial, if the jury instructions were lost, plainly the court is not authorized to review the transcript to determine what the trial "must have been" about or what the jury "must have" convicted **[*25]** the defendant of. The Supreme Court disapproved of such an approach in *Taylor, 495 U.S. at 601.*

To be sure, a "Taylor-type" review of documents may include more than the charging document. See e.g. *United States v. Maness, 23 F.3d 1006, 1009-10* (6th Cir.), cert. denied, *513 U.S. 906, 130 L. Ed. 2d 189, 115 S. Ct. 271 (1994)* **[**27]** (reviewing transcript of guilty pleas and indictments to determine whether defendant actually committed generic burglary when he pled guilty to charges that contained all of the elements of a generic burglary); *United States v. Rutherford, 54 F.3d 370, 372 n. 4* (7th Cir.) cert. denied, *516 U.S. 924, 133 L. Ed. 2d 224, 116 S. Ct. 323 (1995)*("If necessary to resolve an ambiguity in the charging document, the courts may also, in some circumstances, examine the presentence report, plea agreement, or factual findings of the sentencing court"); *United States v. Smith, 10 F.3d 724, 733-34 (10th Cir. 1993)*(per curiam)(holding that "a court can look beyond the statutory count of conviction in order to resolve a patent ambiguity caused by a broad

state statute"; however, the examination is limited to "the charging papers, judgment of conviction, plea agreement or other statement by the defendant for the record, presentence report adopted by the court, and findings by the sentencing judge.")

But the government has cited no case that suggested that a police report not made part of a plea colloquy, not reflected in the complaint or indictment, **[**28]** and not adopted by the defendant in the presentence report or at any other time can comprise "Taylor-type" evidence for the purpose of determining whether the underlying conviction was for a crime of violence. n22

> n22 I have found reference to the use of a police report as an independent piece of evidence, not as part of a formal proceeding or an admission in one case, *United States v. Richardson, 230 F.3d 1297 (11th Cir. 2000).* In Richardson, the court found that a police report was reliable evidence to determine timing of offenses - to operationalize the statutory requirement that the three previous convictions be "committed on occasions different from one another" rather than be part of the same criminal episode. The issue in Richardson -- the timing of offenses -- is not easily determined by Taylor's categorical approach.

A final note: The First Circuit and the Supreme Court have been clear about limiting collateral attacks on convictions during federal sentencing proceedings. **[**29]** *Custis v. United States, 511 U.S. 485, 128 L. Ed. 2d 517, 114 S. Ct. 1732 (1994)*(holding that with the sole exception of convictions obtained in violation of right to counsel, defendant in federal sentencing proceeding has no right to collaterally attack validity of previous state convictions used to enhance his sentence under the ACCA); *Daniels v. United States, 532 U.S. 374, 149 L. Ed. 2d 590, 121 S. Ct. 1578 (2001)* (with the sole exception of convictions obtained in violation of right to counsel, motion to vacate, set aside, or correct sentence is not the appropriate vehicle for determining whether a conviction later used to enhance a federal sentence under ACCA was unconstitutionally obtained). If, on the one hand as in Taylor, a defendant is not allowed to look below the surface of the plea to demonstrate that he did not really threaten anyone, even though the crime to which he pled was an ACCA predicate, then surely the government cannot do the reverse. It cannot look below the surface of the plea to show that even though the plea was to the general offense of breaking and entering and even though nothing else apparently was discussed, what was really going on was a plea **[**30]** to a violent crime.

In conclusion, in answer to the specific remand questions: According to the defendant's affidavit and uncontradicted by any **[*26]** other evidence, the court taking the guilty plea did not have before it the police reports and complaint applications described in the PSR or any other documents describing the defendant's affidavit. At Mr. Shepard's plea hearing, no one mentioned the police reports or the details comprised therein. The defendant did not contest the facts in the police reports and complaint application because the issues never came up. The police reports apparently come from the application for the complaint. There is no indication that they were ever made part of the record of the plea colloquy.

The government has failed to meet its burden of proof with the submission of the police reports.

D. Did Shepard Admit That He Had Pled Guilty to a Crime of Violence Whether in the State Plea Colloquy or in this Proceeding?

Case law suggests that, in addition to trying to reconstruct the circumstances of the plea or the conviction, the government could establish what the defendant pled to through his or her admissions. *Dueno, 171 F.3d at 6* **[**31]** (sentence defendant only for those specific "prior crimes of which he was convicted by a trier of fact or by his own admission.") But if the central question is -- what did the defendant plead to? -- then it follows that the relevant admission need be similarly focused -- an admission with respect to the subject of his guilty pleas, and not admissions about whether the defendant committed the underlying crime. The inquiry is still plea-focused. It is not about whether the defendant did the underlying crime. *Shepard II, 231 F.3d at 66* ("the court's determination about the meaning of the guilty plea can be made on the basis of sufficiently reliable evidence independent of a fact-specific admission. . . . Harris and Dueno leave open the question of what documents are sufficiently reliable evidence for determining whether a defendant's plea of guilty constitutes an admission to a generically violent crime") (emphasis added).

1. Objecting to the Presentence Report

The presentence report lists the defendant's convictions. Beneath each line describing the conviction, the probation officer typically includes a description of the offense from the **[**32]** police report. If the defendant did not object to that portion of the presentence report, presumably he or she would be admitting that the convictions as described in the PSR are accurate - not just the fact of the convictions, but their nature as well.

That is what occurred in *United States v. Harris, 964 F.2d 1234 (1st Cir. 1992)*. The Court characterized the holding in Harris as concluding that the PSR was "a reliable source for establishing whether the defendant pled guilty to a violent crime because the basic facts alleged in the PSR -- i.e., that the defendant perpetrated a violent assault - were 'uncontested and uncontradicted.'" *Shepard II, 231 F.3d at 65* (emphasis added). Since the PSR was uncontradicted, it was reasonable to conclude that both defendant and the government believed that the plea amounted to a plea to the generically violent crime.

In Dueno, the court found that the trial court erroneously concluded that the predicate offense was the violent version, breaking and entering a building, rather than the non-violent version, breaking an entering a car or boat, when the complaint to which the defendant pled could comprise **[**33]** either. Rather than remanding the case for additional fact findings, the government urged the court just to look to the PSR, as it had done in Harris, since the defendant never objected to it. The PSR **[*27]** characterized the offense in question as the violent version, breaking and entering a building.

The court refused, unwilling to engraft a finding of that seriousness to Dueno's failure to object to the PSR, because Dueno's failure to object to the PSR's account, the court found, was not enough to "ground a finding that [he] pleaded guilty to breaking into and entering a building." *Shepard II, 231 F.3d 66* (quoting from *Dueno, 171 F.3d at 7)*. A remand was ordered, in which the court pointed out several issues that the trial court needed to resolve.

The court's language is telling. Two of the problems the court noted related to the record before the judge who accepted Dueno's state plea. The evidence "did not include 'a single document that was before the judge who accepted Dueno's plea, [and] there was no account of what took place at Dueno's plea hearing." *Shepard II, 231 F.3d at 66.*

But the court also mentioned, and this is **[**34]** the point the government emphasizes, that a third problem with the Dueno record was that the PSR included facts that were taken from the police report, but the record did not include the report itself.

From that general suggestion on the Dueno remand, the government makes two arguments: First, all that the government needed to do in order to meet the requirements of the ACCA, and the First Circuit case law, was to produce the certified police report to supplement the PSR. Second, once the government does so, the burden then shifts to the defendant to show the ACCA enhancement does not apply.

The government has taken the police report discussion in Dueno, later repeated in Shepard II, out of context. A certified copy of the police report may show that the PSR accurately describes what the police said in the police report and application for a complaint, and may be taken as an admission to the predicate offense -- if there is no objection from the defendant. But if the defendant objects, as here, the police report alone cannot be used to establish what the defendant pled to or comprise an admission to the predicate offense.

To be sure, the court in Shepard **[**35]** II faulted Mr. Shepard's initial objections. Plainly, "any objection posed by a defendant at the time of sentencing to the facts set forth in a PSR" is not enough to keep a court from finding that the guilty plea constituted an admission to those facts. *Shepard II, 231 F.3d at 68.* All that Mr. Shepard said in his initial objections was that any description of the convicted offenses, beyond the language of the charging documents, is inappropriate under the ACCA.

But Mr. Shepard elaborated on his objections during the re-sentencing proceedings. His affidavits focused on each of the police reports. He indicated that none of the details in these reports were ever mentioned at his pleas. Moreover, he indicated that the reports themselves were never brought up. He noted further that parts were ambiguous and based on hearsay.

The government suggests that Mr. Shepard's additional affidavits are irrelevant at best, inadequate at worst. The only way the government can come to this conclusion is if it asked a different question - the very question which the United States Supreme Court and the First Circuit expressly do not ask. The only adequate response, according to the **[**36]** government, would be for the defendant to say -- "I did not do the things described in the police report" -- or else the facts of the report will be deemed admitted. Under this approach, it would not be enough for the defendant to say, as Mr. Shepard said **[*28]** here -- "I did not plead to those facts because they were not brought up at my plea colloquy."

If what he actually did is the test, as the former response suggests, then this area of the law has come full circle. The defendant says: "I didn't do what the presentence report of convictions said I did" or "I did not do what the police report said I did." The government rebuts, and then I have a trial in my courtroom of state court offenses dating from years ago, the very "archeological dig" that the case law rejects.

Plainly, there are problems with the categorical approach; the enhancement does hinge on the "happenstance of state court record-keeping practices." *Shepard II, 231 F.3d at 67.* But that is unavoidable even if police reports, complaint applications, and other documents are considered. Defendants will always get a windfall when the police lose the police report or other underlying documentation. Any standard **[**37]** which, as in Harris and Taylor, seeks to reconstruct the record necessarily depends on the comprehensiveness of that record.

The Ninth Circuit had to address this in *United States v. Parker, 5 F.3d 1322 (9th Cir. 1993)*. Parker was found guilty of felon in possession of a firearm. The government sought to enhance under the ACCA, based in part on a 1968 conviction. The 1968 charging instrument noted that Parker and a co-defendant "entered a residence . . . with intent to commit theft therein," a violent felony under *18 U.S.C. § 924*(e)(1). Parker, however, was convicted of the charge before a jury, but no jury instructions were available. The question was whether the court could look at the charging paper alone to determine the nature of the conviction when jury instructions were unavailable.

In a prior case, where the jury instructions were not available, the court held that the verdict form could be analyzed in connection with the charging paper. *United States v. Alvarez, 972 F.2d 1000, 1005-1006 (9th Cir. 1992)* (where the charging instrument included allegations of the elements of generic 'burglary' and the verdict **[**38]** stated that the jury found the defendant guilty "as charged in the information," there was enough evidence to establish that the conviction constituted burglary under section 924(e)).

But in Parker, the verdict form provided no information regarding the facts found by the jury. It merely referred to the statutory provision which had been phrased in generic terms. Thus, the court found that reliance on the "charging paper alone" to make the determination under the ACCA was not appropriate. *Parker, 5 F.3d at 1327*

And it added:

181 F. Supp. 2d 14, *; 2002 U.S. Dist. LEXIS 1280, **

Ultimately, whatever rule were adopted, someone -- either criminal defendants or the government -- would benefit from the loss or destruction of jury instructions. . . . Because we can assume that the problem of lost or destroyed instructions will affect primarily older convictions rather than recent ones, the rule we adopt is consistent with the general sentencing principle that he passage of time should dilute -- and not magnify -- the effect of past conduct on punishment for present acts.

Id. at 1328.

Surely the most reliable indicator of what the plea was about was the transcript and exhibits. But as **[**39]** the court noted, there are other ways of establishing the predicate offenses. A defendant may admit to the ACCA predicate or may be taken to have admitted to it through his failure to object to the PSR, as supplemented by a certified police record. The parties could reconstruct the plea through **[*29]** other means - the prosecutor's affidavit about what his usual practice was, the police officer who was present, etc.

But when a defendant denies that those police reports were part of the plea process and objects to probation's characterization of the offenses in the PSR, the government has to prove that there were predicate ACCA convictions. It has not done so here.

III. CONCLUSION

On this record, given this case law, I cannot conclude by a fair preponderance of the evidence that Reginald Shepard has been convicted of "at least" three crimes of violence under the ACCA.

Therefore, the original sentence I imposed on July 14, 1999 (46 months on Count I), was re-imposed on January 11, 2002, for the reasons stated above.

SO ORDERED.

Dated: January 23, 2002

NANCY GERTNER, U.S.D.J.

UNITED STATES, Appellant, v. REGINALD SHEPARD, Defendant,Appellee.
No. 99-2167

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

231 F.3d 56; 2000 U.S. App. LEXIS 28967

November 13, 2000, Decided

SUBSEQUENT HISTORY: [**1] Certiorari Denied October 1, 2001, Reported at: *2001 U.S. LEXIS 5704*.

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Nancy Gertner, U.S. District Judge.

DISPOSITION: Vacated and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff Government appealed from a judgment of the United States District Court for the District of Massachusetts, arguing that the district court erred by refusing to consider the police reports and complaint applications and by not sentencing defendant as an armed career criminal.

OVERVIEW: Defendant pled guilty to breaking and entering on the basis of a complaint that recited the boilerplate language of the statute. The Government submitted police reports and complaint applications to the district court to show that defendant had pled guilty to breaking and entering buildings on five prior occasions. The district court concluded that the United States Supreme Court prohibited consideration of the complaint applications and police reports. At the conclusion of a two-part sentencing hearing, the district court rejected the Government's request for an enhancement under the Armed Career Criminal Act, *18 U.S.C.S. § 924*(e). Government appealed, arguing that the district court erred by refusing to consider the police reports and complaint applications and by not sentencing defendant as an armed career criminal. On appeal, the court vacated the sentence and remanded for resentencing. The court reasoned that the district court did not carry out the required analysis of whether the documents before it constituted sufficiently reliable evidence of the Government and the defendant's shared belief that the defendant was pleading guilty to the unlawful entry of a building.

OUTCOME: Sentence vacated and remanded for resentencing; the district court did not carry out the required analysis of whether the documents before it constituted sufficiently reliable evidence of the Government and the defendant's shared belief that the defendant was pleading guilty to the unlawful entry of a building.

CORE TERMS: sentencing, violent felony, pled guilty, enhancement, burglary, crime of violence, guilty plea, breaking and entering, violent crime, categorical, police report, generic, non-violent, generically, violent, guideline, career, offender, reliable evidence, vessel, uncontradicted, imprisonment, convicted, firearm, physical injury, predicate, breaking, sentence, qualify, felony

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
[HN1] See *Mass. Gen. Laws ch. 266, § 16*.

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
[HN2] See *Mass. Gen. Laws ch. 266, § 18*.

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN3] The United States Supreme Court adopted a "generic" definition of burglary for purposes of the Armed Career Criminal Act, *18 U.S.C.S. § 924*(e), enhancement that limits the crime to an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN4] United States Sentencing Guidelines Manual § 2K2.1(a)(6)(A) prescribes a base offense level of 14 for a person who receives, possesses, or transports a firearm and has a prior conviction for a crime punishable by

imprisonment for more than one year. U.S. Sentencing Guidelines Manual § 2K2.1 cmt.

Criminal Law & Procedure: Appeals: Standards of Review: De Novo Review
[HN5] The question of whether a conviction for a particular type of crime qualifies as a predicate offense under the Armed Career Criminals Act presents a purely legal question, sparking de novo review.

Criminal Law & Procedure: Sentencing: Imposition: Factors
[HN6] The Armed Career Criminals Act provides that a person who violates the felon in possession of a firearm provision and has three prior convictions for a violent felony or serious drug offense, or both, committed on occasions different from one another will receive a 15 year minimum sentence. *18 U.S.C.S. § 924*(e)(1).

Criminal Law & Procedure: Criminal Offenses: Miscellaneous Offenses
[HN7] See *18 U.S.C.S. § 924*(e)(2)(B).

Criminal Law & Procedure: Criminal Offenses: Racketeering: Racketeer Influenced & Corrupt Organizations
[HN8] Predicate offenses under the Armed Career Criminal Act, *18 U.S.C.S. § 924*(e), are crimes having certain common characteristics--the use or threatened use of force, or the risk that force would be used--regardless of how they were labeled by state law.

Criminal Law & Procedure: Criminal Offenses: Miscellaneous Offenses
[HN9] The Armed Career Criminal Act defines as a "violent felony" a crime that otherwise involves conduct that presents a serious potential risk of physical injury to another. *18 U.S.C.S. § 924*(e)(2)(B).

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN10] The career offender enhancement applies if the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S. Sentencing Guidelines Manual § 4B1.1.

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN11] The government bears the burden of proving the applicability of an upward adjustment under the United States Sentencing Guidelines Manual.

Criminal Law & Procedure: Sentencing: Imposition: Factors
[HN12] Sentencing enhancements do not punish a defendant for the prior criminal conduct. Rather, enhancements provide for a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.

COUNSEL: Nadine Pellegrini, Assistant U.S. Attorney, with whom Donald K. Stern, United States Attorney, Dina Michael Chaitowitz, Timothy Q. Feeley, Assistant U.S. Attorneys, were on brief for appellant.

Linda J. Thompson, with whom Jacobson & Thompson, P.C., were on brief for appellee.

JUDGES: Before Torruella, Chief Judge, Lipez, Circuit Judge and Keeton, * District Judge.

* Of the District of Massachusetts, sitting by designation.

OPINIONBY: LIPEZ

OPINION: [*58]

LIPEZ, Circuit Judge. This case requires us to decide the following question: may a sentencing court consider certified copies of police reports and complaint applications to determine whether a defendant pled guilty to three prior "violent felonies" qualifying for sentence enhancement under the Armed Career Criminal Act (ACCA), *18 U.S.C. § 924*(e). This question arises because the Massachusetts breaking and entering statute encompasses unlawful entries into buildings, vehicles, or vessels. For purposes [*59] of the ACCA, however, breaking and entering[**2] into a building qualifies as a violent felony, while breaking and entering into a vehicle or vessel does not.

On at least five prior occasions, Reginald Shepard had pled guilty to breaking and entering on the basis of a complaint that recited the boilerplate language of the statute. The government submitted police reports and complaint applications to the district court to show that Reginald Shepard had pled guilty to breaking and entering buildings on these five prior occasions. At sentencing, the district court concluded that the Supreme Court decision in *Taylor v. United States, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990)*, and our own precedents applying Taylor, prohibited consideration of the complaint applications and police reports. In the view of the district court, such consideration would be

inconsistent with the categorical approach to the analysis of predicate offenses announced in Taylor because police reports and complaint applications "contain allegations that were never adjudicated before a judge or jury, never admitted by Shepard." We disagree with the court's reading of Taylor and our precedents. We vacate the district court's[**3] ruling and remand for resentencing.

I.

On October 17, 1995, Reginald Shepard sold firearms to an undercover agent of the Bureau of Alcohol, Tobacco, and Firearms. During the taped meeting, Shepard sold a Glock 17, 9mm pistol for $600 and ammunition for $20.00. On March 3, 1999, Shepard entered a guilty plea to one count of felon in possession of a firearm, *18 U.S.C. § 922*(g)(1). The ACCA mandates a fifteen-year minimum penalty for a person convicted as a felon in possession of a firearm pursuant to *18 U.S.C. § 922*(g) who has three prior convictions for a violent felony or serious drug offense. See *18 U.S.C. § 924*(e)(1). The government claimed that five of Shepard's eleven prior convictions were burglaries of buildings, a category of violent felony under the ACCA.

The complaints charging Shepard with breaking and entering recited the language of Chapter 266, sections 16 and 18, of the Massachusetts General Laws which define the offense to include unauthorized entry into vehicles or vessels, as well as buildings. n1 For example, a complaint from May 1989 states that Shepard "did break and enter in the[**4] night time the building, ship, vessel or vehicle, the property of Jerri Cothran, with intent to commit a felony therein."

----------Footnotes----------

n1 Section 16 provides:

Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished by imprisonment in the state prison for not more than twenty years or in a jail or house of correction for not more than two and one-half years.
[HN1]
MASS. GEN. LAWS ch. 266, § 16.

Section 18 provides:

Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years.
[HN2]
MASS. GEN. LAWS ch. 266, § 18.

----------End Footnotes----------

In *Taylor v. United States, 495 U.S. 575, 598, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990),*[**5] [HN3] the Supreme Court adopted a "generic" definition of burglary for purposes of ACCA enhancement that limits the crime to "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." To show that Shepard's breaking and entering convictions involved buildings rather than vehicles or vessels, the Government offered certified copies of complaint applications and police reports obtained from the state court files. n2 These [*60] documents contain the following accounts of the five offenses at issue.

May 1989: The Boston police report states:

Responded to R.C. [radio call] to 30 Harlem St. for B & E in progress. On arrival observed cellar door in rear had been broken down. Spoke to victim who [said] she heard noises downstairs. She then observed suspect described above in her pantry.

Consistent with the police report, the complaint application states that the defendant was charged with "breaking and entering night;" that the place of offense was "30 Harlem St.," and that the property stolen or destroyed was a "cellar door."

March 1991: The Watertown police report states:

In reference to . . [**6] a B&E&L from the FRETTERS store # 550 Arsenal Street Town reported on 3-11-91 the following is submitted:

A follow-up investigation revealed that while the manager . . . and the assistant Manager . . . were in the back-room to the above buisness [sic] . . . they observed the back door open and observed a former employee, Reginal Shepard of # 9 Weaver Way Roxbury, enter the room. Upon seeing the two managers, the suspect Shepard ran from the room in a northerly direction out the parking lot toward arsenal street.

NOTE* According to both employee's [sic] this door was locked and the only way in was with a key which they suspect Shepard had in his possession. . . .

After this incident took place both [managers] did a quick inventory of the backroom area and found that (4) Emerson VCRs (20) 13" Hitachi T.V.s and (1) 19" Toshiba T.V. were missing. n3

July 1991: The Boston police report states:

Officers ... responded to a radio call for an S/P wearing red shorts and blue shirt in the hallway of 258 Norwell St.

Upon arrival observed S/P (described above) walking away from above address. S/P carrying a pink pillowcase. Officers detained S/P to conduct threshold [**7]inq., found pillowcase to contain property listed above. . . . Officers checked bldg and found a panel on 3rd floor front door had been broken in exposing inside door lock. Officers entered apt. and observed, in living room, areas where V.C.R. and phone were taken from. Officers also observed in bedroom one pink pillowcase missing from pillow. Sheets and pillowcases in bedroom were all pink in color.

Consistent with the police report, the complaint application states that the defendant is charged with "b/e daytime," that the place of offense is "258 Norwell St." and that the property stolen or destroyed was a "V.C.R" and "phone/ans. machine."

February 1994: The Watertown police report states:

Responded to a R/C [radio call] for a black male going door to door asking for an unk. person. . . . [Witness said suspect] went next door to # 145 Gallivan and was observed by the witness attempting to gain entry by turning several door knobs . . . Officer ... went to the rear of the property and suspect was observed with both arms through the glass partition (Glass to door was shattered) attempting to gain entry to the second door (near basement).

The complaint[**8] application states that the defendant was charged with "1. breaking & entering 2. wilful malicious destruction of personal property," that the place of offense was "145 Gallivan Blvd.," and that [*61] the property stolen or destroyed was a "rear door."

April 1989: According to the district court: n4

The complaint application suggested that a building was involved, alleging that Shepard gained access to the Children's Center by breaking a window, and in so doing, he put the Director of the Center in fear.

----------Footnotes----------

n2 By certifying a document, the signer attests that it has been accurately copied, not that the facts in it have been verified. The certifications of the police reports and complaint applications signed by the clerk or magistrate in this case state: "I hereby certify that this is a true copy, given under my hand and seal this 6 day of May 1999."

n3 The record does not include a complaint application.

n4 We refrain from the district court's rendering of the complaint application because we do not have the application in the record before us. The district court notes that the government did "not provide any additional documentation."

----------End Footnotes----------

[**9]

The Probation Department included in the Pre-Sentence Report (PSR) descriptions of the police reports and complaint applications. The department concluded, however, that the court could not sentence Shepard as an armed career criminal because it could not use those documents to determine whether Shepard had pled guilty to a violent felony. Shepard agreed with the department's conclusion, but he objected to the inclusion in the PSR of factual allegations other than those set forth in the complaints to which he had pled guilty in state court. The government also filed an objection with the court challenging the Probation Department's failure to apply the ACCA enhancement.

At the conclusion of a two-part sentencing hearing, the court rejected the government's request for an enhancement under the ACCA, which would have placed Shepard's sentencing range at 188-235 months. Instead, the court sentenced Shepard pursuant to the "prohibited person" provision, [HN4] U.S.S.G. § 2K2.1(a)(6)(A), which prescribes a base offense level of 14 for a person who receives, possesses, or transports a firearm and has a prior conviction for a "crime punishable by imprisonment for more than one year," U.S.S.G. [**10] § 2K2.1, comment. (n.6). The court also granted the government's motion for an upward departure pursuant to U.S.S.G. § 4A1.3 due to the seriousness of Shepard's criminal history and increased his sentencing range from 30-37 months to 37-46 months. We quote at length the district court's lucid rationale for its decision:

Police reports and complaint applications do not meet the narrow exception to the categorical approach. They contain allegations that were never adjudicated before a judge or jury, never admitted by Shepard. In fact, there is no indication that the sentencing judge in the original case even had any of these documents available when he or she sentenced Shepard. See [*United States v.] Dueno, 171 F.3d [3] at 6* (noting the government provided no documents which had been before the judge when the plea was accepted).

No plea colloquies or plea agreements were offered to suggest that Shepard adopted one version of the facts rather than another for each of the convictions. Moreover, because Shepard objected to the factual representations in the PSR, the government cannot rely on the characterizations found within. See [*United States v.] Harris, 964 F.2d [1234] at 1236-37*.

In[**11] fact, not only did Shepard not litigate these facts, he had no idea he had to do so. These facts -- the location of the breaking and entering -- were not necessary to his state plea. It is only now, years later, that they seem central because of a federal sentencing regime enacted years after Shepard pled.

Contrast Shepard's situation with that of a federal defendant pleading guilty today. Now, federal defendants who plead guilty make strategic decisions about which facts to contest and which to accept, carefully considering the impact their admissions will have on the ultimate sentence. The plea colloquy has assumed new significance, which it never had in state court.

To attach such importance to facts neither litigated nor conceded violates the policies articulated by the Supreme Court in Taylor, and subsequent First Circuit precedent. See *Taylor, 495 U.S. [*62] at 600-602* (unfair to impose a sentencing enhancement based on the federal court, rather than the state court's review of the facts); *Dueno, 171 F.3d at 6* (sentence defendant only for those specific "prior crimes of which he was convicted by a trier of fact or by his own admission"). [**12]

The government brought this appeal, arguing that the district court erred by refusing to consider the police reports and complaint applications and by not sentencing Shepard as an armed career criminal. [HN5] The question of "whether a conviction for a particular type of crime qualifies as a predicate offense [under the Armed Career Criminals Act] presents a purely legal question, sparking de novo review." *United States v. Winter, 22 F.3d 15, 18 (1st Cir. 1994)*.

II.

A. The Taylor Categorical Approach

[HN6] The Armed Career Criminals Act provides that a person who violates the felon in possession of a firearm provision (§ 922(g)) and has three prior convictions "for a violent felony or serious drug offense, or both, committed on occasions different from one another" will receive a fifteen-year minimum sentence. n5 *18 U.S.C. § 924*(e)(1). The statute defines a violent felony as:

Any crime punishable by imprisonment for a term exceeding one year . . . that

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use[**13] of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

[HN7] *18 U.S.C. § 924*(e)(2)(B).

----------Footnotes----------

n5 When the ACCA applies, the Guidelines address whether, based on the defendant's criminal history and offense level, the fifteen-year minimum or a greater sentence is warranted. U.S.S.G. § 4B1.4 specifies how the court should calculate the defendant's criminal history and base offense level so that it can use the sentencing grid to determine the length of imprisonment beyond the statutory minimum.

----------End Footnotes----------

In *Taylor v. United States, 495 U.S. at 596-600*, the Supreme Court considered whether the defendant's prior burglary convictions qualified for enhancement under § 924(e) despite the defendant's contention that the convictions did not involve conduct that presented a serious potential risk of physical injury to another. The United States Court of Appeals for the Eighth Circuit had rejected Taylor's argument, ruling that[**14] the word burglary in § 924(e)(2)(B)(ii) "means 'burglary' however a state chooses to define it." *United States v. Taylor, 864 F.2d 625, 627 (1989)*. The Supreme Court disagreed, concluding that [HN8] predicate offenses under the ACCA are "crimes having certain common characteristics--the use or threatened use of force, or the risk that force would be used--regardless of how they were labeled by state law." *Taylor, 495 U.S. at 589*. The Court called this focus on crimes having certain specified elements or common characteristics a "categorical approach," which the Court attributed to Congress. In order to implement the categorical approach in Taylor, the Court concluded that Congress "had in mind a modern 'generic' view of burglary, roughly corresponding to the definitions of burglary in a majority of the States' criminal codes." Id. The court found that definition to be the following: "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id. at 598*.

Having settled upon the generic definition of burglary intended by Congress in the ACCA, the Court turned to a second[**15] question in Taylor: "whether, in the case of a defendant who has been convicted [*63] under a nongeneric-burglary statute [e.g. one that includes places, such as automobiles and vending machines, other than buildings], the Government may seek enhancement on the ground that he actually committed a generic burglary." *Id. at 599-600*. In addressing that question, the Court again invoked the categorical approach intended by Congress. It noted that "the practical difficulties and potential unfairness of a factual approach are daunting," *id. at 601*, and concluded that the categorical approach to the nongeneric burglary statute "requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense." *Id. at 602*.

Then the Court immediately offered a qualification to the rule it had just announced:

This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary. For example, in a State whose burglary statutes include entry of an automobile as[**16] well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

Id. This qualification permits a court to consider the charging document and jury instructions and to conclude that the fact of conviction necessarily means conviction of the generic crime of burglary included in the ACCA. n6

----------Footnotes----------

n6 In addition to specific crimes such as burglary, arson, and extortion, [HN9] the Armed Career Criminal Act defines as a "violent felony" a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *18 U.S.C. § 924*(e)(2)(B). We have regarded the Taylor categorical approach for burglary as applying to other kinds of felonies that may qualify as violent under the "otherwise" clause. See *United States v. Sacko, 178 F.3d 1, 7 (1st Cir. 1999)*.

----------End Footnotes----------

[**17]

In Taylor, however, the Court did not address the extent to which a sentencing court can go beyond the fact of conviction, for the purpose of determining an ACCA enhancement, when a defendant has pled guilty to a charge based on a statute that includes both violent and non-violent offenses within the meaning of the ACCA. That is the issue we have addressed in our precedents, n7 and to which we now turn.

----------Footnotes----------

n7 To be precise, our precedents address this issue in the context of both the Guidelines' career offender enhancement for crimes of violence and the Armed Career Criminal Act's enhancement for violent felonies. [HN10] The career offender enhancement applies if the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." See U.S.S.G. § 4B1.1. The commentary to U.S.S.G § 4B1.4 states: "It is to be noted that the definitions of 'violent felony' and 'serious drug offense' in *18 U.S.C. § 924*(e)(2) are not identical to the definitions of "crime of violence" and "controlled substance offense" used in § 4B1.1 (Career Offender) . . . ." U.S.S.G § 4B1.4, cmt.n.1. Despite the differences between § 4B1.1 and § 924(e)(2), the categorical approach applies to both provisions and we may look to the § 4B1.1 cases to elucidate the nature of the categorical inquiry. See, e.g., *United States v. Meader, 118 F.3d 876, 882 (1st Cir. 1997)*(although Taylor's narrow exception may apply to cases that come under the "otherwise" clause of § 4B1.2, "the standard approach for determining whether a particular crime fits within the 'crime of violence' rubric is a generic one, in which inquiry is restricted to the statutory definitions of the prior offense, without regard to the particular facts underlying them"); *United States v. Winter, 22 F.3d 15, 18 (1st Cir. 1994)*("Determining whether a previous conviction represents a crime of violence necessitates a formal categorical approach.").

----------End Footnotes----------

[**18]

B. The Categorical Approach and the Guilty Plea

Not surprisingly, our precedents separate into two strands that reflect the two distinct questions addressed by the Supreme [*64] Court in Taylor. We will discuss them accordingly.

1. Whether the Applicable State Statute Defines a Violent Felony or a Crime of Violence

As we noted, the Taylor Court first decided what common elements of burglary would make it a violent felony under the ACCA. In *United States v. Damon, 127 F.3d 139 (1st Cir. 1997)* and in *United States v. Sacko, 178 F.3d 1 (1st Cir. 1999)*, the comparable question was whether the statutory offenses at issue in those cases constituted a crime of violence within the meaning of the Guidelines (Damon) or a violent felony within the meaning of the ACCA (Sacko). This was a general definitional question that did not depend on documents specific to that case.

In Damon, we considered the district court's use of a PSR to determine whether a Maine conviction for aggravated criminal mischief constituted a "crime of violence." The charging document indicated that Damon was convicted under subsection B of the statute, which[**19] applies to a person who intentionally or knowingly damages or destroys property valued at over $2,000 in order to collect insurance proceeds. See *Damon, 127 F.3d at 142-43*. Thus, "the inquiry is whether the elements of subsection B fit the definition of a crime of violence under U.S.S.G. § 4B1.2(1)(ii)." *Id. at 143*. We looked to the "mine run of conduct" that the statute was intended to cover and concluded that "the typical conduct reachable under subsection B does not involve a serious potential risk of physical injury to another." *Id. at 143-44*. We concluded that the district court erred by considering the fact that the defendant set fire to his house to collect insurance proceeds because "under Taylor, when the predicate statutory crime has been determined to be typically non-violent, the inquiry ends." *Id. at 145*.

In Sacko, we concluded that the district court erred by considering the statement in the PSR that the defendant's prior statutory rape conviction involved non-consensual intercourse. That consideration involved the very reliance proscribed by Taylor--reliance on "the facts of Sacko's crime[**20] in order to determine whether his conviction was for a violent or a non-violent crime," *Sacko, 178 F.3d at 5*. We held that under the categorical approach, the proper inquiry was whether the category of the offense, statutory rape of a fourteen year-old, constituted a violent felony. We noted that there was "no legal basis . . . no studies or medical journals" to ground a holding that intercourse with an adult is physically dangerous for a fourteen-year-old female. *Id. at 6*. We remanded the case to the district court to take evidence on this issue.

Both Damon and Sacko posed the definitional question whether the statutory offenses at issue constituted a crime of violence under the career offender guideline (Damon) or a violent felony within the meaning of the ACCA (Sacko). n8 There [*65] was no uncertainty about whether a violent or non-violent offense encompassed within a statute was involved in the fact of conviction. As we noted in Damon, such cases do not "raise the question of what documents beyond the charging document or the jury instructions may be examined to determine which subsection of the multi-faceted crime is involved. [**21] The question about what subsection or type of statutory crime is involved is resolved here by the charging document." *127 F.3d at 144 n.5*.

----------Footnotes----------

n8 Our circuit addressed related definitional questions in two other cases, *United States v. Winter, 22 F.3d 15 (1st Cir. 1994)* and *United States v. Meade, 175 F.3d 215 (1st Cir. 1999)*.

In Winter, the issue before the court was whether racketeering, conspiracy to commit racketeering, travel in aid of racketeering, and sports bribery qualified as predicate crimes of violence under the career offender guideline. Because physical force is not an element of any of these offenses, we asked whether, from a categorical standpoint, any of them could be said to pose "serious risk of physical injury," as the guideline required. Following Taylor, we cautioned that "the court should not plunge into the details of a particular defendant's conduct," but, rather, "should merely assess the nature and object of the racketeering activity as described in the indictment and fleshed out in the jury instructions." *Winter, 22 F.3d at 19*.

Meade involved the question of whether the defendant's misdemeanor conviction for spousal assault, under a general assault and battery statute, qualified as a misdemeanor crime of domestic violence. The court construed the underlying statute to determine that the conviction did so qualify, rejecting the defendant's argument that Taylor's categorical approach should extend so far as to prevent courts from establishing the elements of the statute of conviction. See *Meade, 175 F.3d at 221*.

----------End Footnotes----------

[**22]

2. Whether the Fact of Conviction was for a Violent or Non-Violent Felony When the Applicable State Statute Encompasses Both

The second question addressed in Taylor was whether a conviction under a nongeneric burglary statute, which included violent and nonviolent offenses, could be a conviction for a predicate offense under the ACCA. In *United States v. Harris, 964 F.2d 1234 (1st Cir. 1992)* and *United States v. Dueno, 171 F.3d 3 (1st Cir. 1999)*, we addressed a comparable question. There was no definitional uncertainty in those cases about whether a statutory offense constituted a violent crime. Instead, the uncertainty was whether the fact of conviction related to a violent crime or a nonviolent crime. As we recognized, that uncertainty could only be resolved by considering case specific documents.

In Harris, the defendant pled guilty to a Massachusetts assault and battery statute which covered both actual or potential physical harm and unharmful but nonconsensual touching. We acknowledged the general rule under Taylor that when the statute encompasses violent and non-violent conduct, the sentencing court should look to[**23] the indictment and information or jury instructions to make the violent felony determination. However, we recognized that Harris's case posed a further question: "What . . . should a court do when there are no jury instructions to look at . . . because the defendant pled guilty?" *Harris, 964 F.2d at 1235*. In answer to that question, we said the sentencing court should:

> look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested . . . in the violent or non-violent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime . . . rather than the generically non-violent crime . . . was at issue.
>
> *Id. at 1236*.

We concluded in Harris that "the record before us provides adequate information to make the required determination relatively simply." Id. In particular, we considered a PSR which recited facts from the case file revealing that both of the defendant's assault and battery convictions involved violent beatings. *Id. at 1236-37*. We found the[**24] PSR to be a reliable source for establishing whether the defendant pled guilty to a violent crime because the basic facts alleged in the PSR--i.e., that the defendant perpetrated a violent assault--were "uncontested and uncontradicted." *Id. at 1237*. Given the PSR's uncontradicted account of the defendant's conduct, we concluded "that the defendant and the government both believed" that a generically violent crime was the basis for the defendant's guilty pleas. *Id. at 1236*.

In *United States v. Dueno, 171 F.3d 3, 6-7 (1st Cir. 1999)*, despite strong urging from the defendant, we refused to retreat from Harris's limited inquiry into conduct "in respect to which the defendant was charged and pled guilty." *Dueno, 171 F.3d at 5* (analyzing the Guidelines' career offender enhancement). As here, Dueno involved a predicate Massachusetts breaking and entering conviction memorialized [*66] by a judgment which was ambiguous as to whether the defendant broke into or entered a building or a vehicle. See *id. at 5*. On appeal, the government conceded that the district court had engaged in erroneous reasoning in concluding[**25] that the conviction was for breaking into and entering a building, n9 but urged us to sustain the enhancement on the ground that Dueno never contradicted the PSR's account of the break-in, which described a building invasion See *id. at 6*. Although we regarded the issue as "close," we declined to affirm on the government's alternative ground and instead remanded. *Id. at 7*. Applying Harris, we concluded that "on the present record, a reasonable jurist could conclude that there is insufficiently reliable evidence to ground a finding that Dueno pleaded guilty to breaking into and entering a building." *Id. at 7*. Specifically, we noted several problems with the evidence presented to the sentencing court. First, instead of offering the police report from which the facts were taken, the government offered only the PSR which incorporated facts from the police report. Second, the evidence did not include "a single document that was before the judge who accepted Dueno's plea." *Id. at 7*. Third, there was no account of what took place at Dueno's plea hearing.

----------Footnotes----------

n9 The court had accepted the government's argument that a second charge in the complaint for destruction of property, which alleged harm to "the personal property, dwelling, house or building of [the victim]," established that Dueno broke into and entered a building, and thus committed a crime of violence. On appeal, the government conceded that this description could refer to unlawful entry and vandalism of a vehicle as much as to destruction of property related to breaking and entering into a building. See *Dueno, 171 F.3d at 5-6*.

----------End Footnotes----------

[**26]

At the conclusion of Dueno, we said the following:

> Dueno's sentence for this crime can reflect only those prior crimes of which he has been convicted -- either by a trier of fact or by his own admission. As matters now stand, the evidence is insufficient for us to conclude, as a matter of law, that Dueno's 1994 guilty plea constituted an admission to the building invasion described by the police report.

Dueno, 171 F.3d at 7 (emphasis added). In its decision in this case, the district court relied on the language we emphasize. Although the court's reliance on this language is understandable, that reliance nevertheless reflects a misapplication of Harris, reaffirmed by the Dueno decision, and of Dueno itself.

C. Consideration of Police Reports and Complaint Applications

Dueno's reference to an admission by the defendant cannot be read apart from the inquiry framed in Harris: looking to the conduct in respect to which the defendant was charged and pled guilty, did "the defendant and the government both believe[] that the generically violent crime . . . rather than the generically non-violent crime . . . was at[**27] issue." *Harris, 964 F.2d at 1236*. In fact, having reaffirmed Harris, Dueno describes the sentencing court's inquiry into the meaning of the defendant's guilty plea in a specific sense that reflects Harris--does the defendant's plea of guilty "constitute an admission" to a crime of violence? See *Dueno, 171 F.3d at 7* ("the evidence is insufficient for us to conclude, as a matter of law, that Dueno's 1994 guilty plea constituted an admission to the building invasion described by the police report") (emphasis added). The court's determination on the violent felony or crime of violence question does not turn on an explicit admission by the defendant to alleged conduct in the sense of "yes, I struck the victim in the face," either at the time the defendant pled guilty to the earlier offense or when the enhancement issue arises at sentencing for a subsequent offense. Rather, the court's determination about the meaning of the guilty plea can be made on the basis of sufficiently reliable evidence independent of a fact-specific admission. See *United States v. Broce, [*67] 488 U.S. 563, 570, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989)* ("By[**28] entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.").

Nevertheless, Harris and Dueno leave open the question of what documents are sufficiently reliable evidence for determining whether a defendant's plea of guilty constitutes an admission to a generically violent crime under a statute that encompasses violent and non-violent conduct. In Harris, we allowed the district court to rely on an uncontradicted PSR. In Dueno, where the court had used faulty reasoning in making its crime of violence determination, we declined to rule that the uncontradicted narration of events in the PSR established that Dueno had pled guilty to a crime of violence. Rather, in concluding that the issue reasonably could be decided either way, we pointed out that the government did not offer the police report from which the facts in the PSR were taken, nor any other document that was before the judge who accepted Dueno's plea.

Here, noting the deficiencies cited in Dueno, the government offered certified copies of police reports and complaint applications. Based on our precedents, [**29] we see no justification for an absolute bar to the consideration of such documents when the sentencing court must determine whether the defendant and the government both believed that the defendant was entering a guilty plea to a generically violent crime. n10 Such a bar would make the use of prior convictions based on guilty pleas for purposes of the ACCA or criminal offender guideline enhancement hinge on the happenstance of state court record-keeping practices. The enhancement would only apply when a plea agreement or a plea transcript had been preserved that showed a defendant pled guilty to a violent felony or a crime of violence. Indeed, in Dueno, where we could have easily adopted a bright-line rule barring the use of police reports, we did not. We noted instead the absence in the record of "a copy of the police report in question" or of "an explanation where the police report came from." *Dueno, 171 F.3d at 7*. These specific deficiencies made the PSR account insufficiently reliable for us to determine as an initial matter and as a matter of law that Dueno pled guilty to breaking and entering into a building.

----------Footnotes----------

n10 Other circuits have not addressed the precise question of whether police reports and complaint applications are reliable evidence for determining whether a defendant has pled guilty to a violent crime when the statute under which he is charged addresses violent and non-violent conduct. Some courts, however, have allowed consideration of documents such as PSRs, plea agreements, and plea transcripts. See *United States v. Bonat, 106 F.3d 1472, 1476 (9th Cir. 1997)* (district court properly relied on plea transcript to determine whether defendant pled guilty to generic burglary); *United States v. Adams, 91 F.3d 114, 116 (11th Cir. 1996)* (district court properly considered PSR to determine whether defendant's prior conviction was for generic burglary); *United States v. Hill, 53 F.3d 1151, 1154 (10th Cir. 1995)* (en banc), cert. denied, *516 U.S. 900, 133 L. Ed. 2d 182, 116 S. Ct. 258 (1995)* (district court may consider text of guilty plea and/or other documents that, coupled with the charging instrument, enable the court to determine that defendant's prior conviction was for generic burglary); *United States v. Gallman, 907 F.2d 639, 645 n.7 (7th Cir. 1990)*, cert. denied, *499 U.S. 908, 113 L. Ed. 2d 219, 111 S. Ct. 1110 (1991)* (district court should refer to plea agreement or plea transcript to determine whether defendant's prior conviction was for generic burglary). But see *United States v. Barney, 955 F.2d 635, 639 (10th Cir. 1992)* ("we do not hold . . . that the sentencing court determining enhancement may rely on the presentence report").

----------End Footnotes----------

[**30]

The district court in this case did not attempt to evaluate the reliability of the police reports and complaint applications as a basis for the finding contemplated by both Harris and Dueno--whether the defendant and the government both believed that Shepard was entering guilty pleas to the generically violent crime of [*68] breaking and entering a building. In addressing that issue, the court should have asked the kind of questions suggested by our precedents. As discussed in Dueno, did the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct? Where did the police reports come from? What took place at Shepard's plea hearings? More specifically, as discussed in Harris, did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime? We cite these questions from our precedents as illustrative of the kind of[**31] inquiry that should be made. They are not offered as an exhaustive list.

The reference above to a defendant's contesting the facts set forth in a police report requires us to address a

confusion relating to the concept of an admission when the enhancement issue arises at sentencing. The district court stated that "if the relevant facts contained in the PSR are uncontested, the court may consider these as further admissions by the defendant." See also *Dueno, 171 F.3d at 7; Harris, 964 F.2d at 1236-37.* That statement is accurate. Such admissions would be important for the reasons they were important in Harris:

These two items of uncontested and uncontradicted information make clear that neither of the two "assault and battery" crimes for which Harris was charged and convicted were "nonconsensual touching" crimes, and both were of the "physically harmful" or "potentially physical harmful" variety.

Harris, 964 F.2d at 1237. These admissions during the sentencing process are an example of reliable evidence that would permit a sentencing court to conclude that the defendant's guilty plea to a prior offense constituted[**32] an admission to a generic violent felony or crime of violence. But it does not follow from this proposition that any objection posed by a defendant at the time of sentencing to the facts set forth in a PSR, or in an underlying police report or complaint application, precludes the court from finding that the defendant's guilty plea constituted such an admission. Such a result would be inconsistent with the preponderance of the evidence standard that generally applies when a court determines whether a defendant qualifies for an enhancement under the ACCA or career offender provision. See *United States v. Spell, 44 F.3d 936 (11th Cir. 1995).*

Therefore, the nature of the objection posed to a PSR, or to underlying documents relied upon by the government, must be considered carefully. The district court suggests that Shepard contested the accuracy of the facts in those documents that are relevant to whether he committed a generically violent crime. "At no point--then or now, during the various plea colloquies, or at this sentencing--did Shepard concede the facts on which the government now relies. Indeed, Shepard expressly contested any characterizations of these convictions [**33]that went beyond the words of the complaint." However, Shepard's Taylor-based categorical objection to the use of the complaint applications and police reports does not challenge the accuracy of the statements in those documents describing entries into buildings. Shepard stated that these documents generally carry a high risk of unreliability without ever explaining why that was true in his case. Shepard's general challenge to the appropriateness of the PSR setting forth accounts of his past crimes, or to the reliance on police reports and complaint applications for those accounts, left those accounts uncontradicted, just as they were in Harris and Dueno.

We cannot anticipate the specific objections that Shepard might pose to the government's documents. We can emphasize, however, that the issue before the [*69]sentencing court is not what Shepard did to provoke the criminal charges to which he pled guilty. Rather, the issue, again, is the one framed in Harris: did the defendant and the government both believe at the time Shepard entered his pleas "that the generically violent crime . . . rather than the generally non-violent crime . . . was at issue." *Id. 964 F.2d at 1236.* [**34]To conclude otherwise would enmesh the district court in the kind of factually disputed "archeological dig" about the defendant's conduct that Taylor guards against, with all the attendant practical difficulties of holding mini-trials on a defendant's prior convictions. See *Winter, 22 F.3d at 19.*

Shepard's objections to the government's police reports and complaint applications might focus, for example, on any inconsistencies or ambiguities in their description of the defendant's conduct, or any circumstances relating to the creation or reproduction of the documents, that affect their usefulness for determining whether Shepard and the government both believed that an entry into a building was at issue when he entered the guilty pleas. Or Shepard might offer an account of what took place at his plea hearings, including the documents before the judge, that raises questions about that issue. If the government needs to respond to such objections, the response should usually be "limited to examining easily produced and evaluated court documents, including the judgment of conviction, charging papers, plea agreement, presentence report adopted by the court, and the findings[**35] of a sentencing judge." *Spell, 44 F.3d at 939.* To that list we add transcripts of the plea hearing or other documents that were before the judge who accepted the guilty plea at issue.

In the face of plausible objections from Shepard, and in the absence of a sufficient response from the government, the court may decide that it cannot conclude by a preponderance of the evidence that his pleas of guilty constituted admissions to unlawful entries into buildings. [HN11] The government, of course, "bears the burden of proving the applicability of an upward adjustment under the guidelines [or the ACCA]," *Dueno, 171 F.3d at 7.*

III.

In Taylor, the Supreme Court said that the sentencing court could go beyond the mere fact of conviction "in a narrow range of cases where a jury was actually required to find all the elements of generic burglary." *Taylor, 495 U.S. at 602.* By examining the indictment or information and jury instructions in such cases, the court could conclude "that the jury necessarily had to find" that the defendant had been convicted of the violent felony of entry into a building, i.e. a violent felony. Id.

The concept[**36] of a necessary finding does not apply to disputes about the meaning of a defendant's guilty plea, and whether that plea constitutes an admission to a violent felony or a crime of violence. As we have indicated, those disputes must be resolved by a finding of fact pursuant to the preponderance of the evidence standard. Such a finding is not a necessity. It is based on a judgment about the weight of the evidence.

Without minimizing the high stakes involved in sentencing enhancements, we note that courts routinely resolve factual disputes during sentencing hearings. We see no reason why disputes about the meaning of a defendant's guilty plea should be immune from that process, so long as the inquiry is consistent with the principles of Taylor. We believe that we have described such an inquiry here.

In Taylor, the Supreme Court explained why it would be unfair for a sentencing court to look to the facts underlying the prior conviction to determine if a defendant had pled guilty to a violent felony. "Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to [*70]impose a sentence[**37] enhancement as if the defendant had pleaded guilty to burglary." *Taylor, 495 U.S. at 601-02.* We, of course, agree. It would be decidedly unfair to determine subsequently, for the purpose of sentence enhancement under the ACCA or the career offender guideline, that the conviction resulting from a guilty plea was for a violent crime, based on the actual conduct of the defendant, when the defendant in fact pled guilty to a non-violent crime. But we see no unfairness in a court deciding on the basis of sufficiently reliable evidence that the government and the defendant shared the belief that the defendant was pleading guilty to a generically violent crime, and hence the defendant's plea constituted an admission to such a crime.

We also see no unfairness in a point emphasized by the district court in its decision rejecting consideration of the police reports and complaint applications--namely, that Shepard had no appreciation of the importance of challenging the location of the breaking and entering when he pled guilty to the breaking and entering charges in the Massachusetts courts because he could not anticipate that his convictions for these charges would be so important [**38]for subsequent sentencing under the ACCA. Logically, the premise of this concern is that Shepard would have tried to minimize his criminal history because of the possibility that he would commit another crime. We do not find persuasive a fairness argument grounded in such a premise. [HN12] Sentencing enhancements do not punish a defendant for the prior criminal conduct. See *Nichols v. United States, 511 U.S. 738, 747, 128 L. Ed. 2d 745, 114 S. Ct. 1921 (1994)* ("Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction."). Rather, enhancements provide for "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger v. Burke, 334 U.S. 728, 732, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948).*

In summary, the court below concluded that it could not consider the police reports and complaint applications offered by the government because of its erroneous view that the violent felony determination could only be[**39] based on adjudicated or specifically admitted facts. The court did not carry out the required analysis of whether the documents before it constituted sufficiently reliable evidence of the government and the defendant's shared belief that the defendant was pleading guilty to the unlawful entry of a building. We therefore vacate the sentence and remand for resentencing.

Vacated and remanded.

UNITED STATES OF AMERICA, v. REGINALD SHEPARD, Defendant.
Crim. No. 98-10262-NG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OFMASSACHUSETTS

125 F. Supp. 2d 562; 2000 U.S. Dist. LEXIS 20106

January 20, 2000, Decided

DISPOSITION: **[**1]** Court departed up two levels, to an offense level of 14. Court sentenced Shepard to 46 months in prison, with three years supervised release. Court recommended that Shepard participate in the 500 hour Intensive Drug Treatment program in the Bureau of Prisons and directed him to send periodic reports to court of his progress.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant pleaded guilty to one count of being a felon in possession of a firearm. Two sentencing hearings were held. The Government asked his sentence be enhanced for his being an Armed Career Criminal, based on police reports and complaint applications, and also because of the number and nature of his prior convictions.

OVERVIEW: Defendant pleaded guilty to being a felon in possession of a firearm. At the time of the offense, he had a number of prior state criminal convictions for breaking and entering. The government argued that at least five were "violent felonies" under the Armed Career Criminal Act, because they qualified as burglaries under *18 U.S.C.S. § 924*(e)(2), and also sought an upward departure pursuant to U.S. Sentencing Guidelines Manual § 4A1.3, based on the seriousness of his criminal history. The court was concerned with how far it could look beyond the language of the indictment to determine the character of prior convictions. It found defendant was not an armed career criminal but did depart upward two levels, for a base offense level of 14, under to U.S. Sentencing Guidelines Manual § 2K2.1(a)(6)(A), having recognized his guilty plea entitled him to a 2-level reduction under U.S. Sentencing Guidelines Manual § 3E1.1(a). His total offense level and criminal history category yielded a sentencing range of 37-46 months. He was sentenced to 46 months to qualify him for the prison's 500-hour drug treatment program.

OUTCOME: Defendant was not an Armed Career Criminal. Evaluating only his formal record of convictions, the number, timing, and nature suggested his culpability and likelihood of recidivism, so the court departed upward two levels, to an offense level of 14, sentenced him to 46 months and three years supervised release, and recommended he participate in a 500-hour Intensive Drug Treatment program.

CORE TERMS: sentence, breaking and entering, burglary, criminal history, departure, sentencing, upward, categorical, guideline, vessel, intent to commit, firearm, felony, house of correction, shoplifting, trespassing, ship, sentenced, convicted, imprisonment, threatening, generic, violent felony, breaking, motor vehicle, indictment, larceny, score, night time, peek

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN1] Under the U.S. Sentencing Guidelines Manual § 2K2.1(a)(6)(A), the base offense level will be 14 if the defendant is a "prohibited person." A "prohibited person" is defined to include anyone who is under indictment for, or has been convicted of, a crime punishable by imprisonment for more than one year.

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
[HN2] See *Mass. Gen. Laws ch. 266, § 16* (1990).

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
[HN3] See *Mass. Gen. Laws ch. 266, § 18* (1990).

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
Criminal Law & Procedure: Sentencing: Criminal History: Three Strikes
[HN4] Pursuant to U.S. Sentencing Guidelines Manual § 4B1.4 and *18 U.S.C.S. § 924*(e), a defendant is determined to be an armed career criminal if the following conditions exist: (1) the instant offense of conviction is a violation of *18 U.S.C.S. § 922*(g); and (2) the defendant has at least three prior convictions for a "violent felony" or "serious drug offense" committed on occasions different from one another.

Criminal Law & Procedure: Sentencing: Criminal History: Three Strikes
[HN5] See *18 U.S.C.S. § 924*(e)(2).

Criminal Law & Procedure: Sentencing: Imposition: Factors
[HN6] A sentencing court should narrow its inquiry to the fact of conviction, and whether the statute of conviction included the generic elements, rather than examining the facts underlying the convictions. This is dubbed the "categorical" approach.

Criminal Law & Procedure: Sentencing: Imposition: Factors
[HN7] If a defendant was convicted after a trial, the sentencing court is permitted to consider what the jury instructions suggested about the verdict. If the defendant pled, the court may consider what he admitted to at his plea. Finally, if the relevant facts contained in the Presentence Report are uncontested, the court may consider these as further admissions by the defendant.

Criminal Law & Procedure: Sentencing: Criminal History: Three Strikes
[HN8] A defendant's past criminal conduct is directly relevant to the purposes of sentencing: An individual with a record of criminal behavior is more culpable than a first offender. Moreover, "general deterrence" requires that a message be sent that repeated criminal behavior will aggravate the punishment. Finally, a criminal record is correlated with recidivism on the one hand, and the limited likelihood of rehabilitation on the other.

Criminal Law & Procedure: Sentencing: Criminal History: Three Strikes
[HN9] For the most part, for sentencing purposes the criminal history score is keyed to the length of the sentence that the individual received in state court. Presumably, the longer the sentence, the more serious the underlying conduct must have been. Category VI, however, is the highest category, reserved for anyone with a criminal history score of 13 or more.

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN10] In calculating the appropriate offense level when the Criminal History Category is already VI, the U.S. Sentencing Guidelines Manual instructs the court to depart by moving incrementally down the sentencing table to the next higher offense level until it finds the range appropriate for the case. U.S. Sentencing Guidelines Manual § 4A1.3.

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN11] In determining "appropriateness" of a sentence, the court is guided by the statute creating the Federal Sentencing Guidelines, the Sentencing Reform Act. It directs the court to impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth. *18 U.S.C.S. § 3553*(a).

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN12] The Bureau of Prisons considers only the amount of time in its custody in calculating the prerequisites for the intensive drug treatment program. A guidelines sentence, minus the amount already served in pre-trial detention, will not suffice.

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN13] See *18 U.S.C.S. § 3553*(a)(2).

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U. S. Attorneys: Nadine Pellegrini, United States Attorney's Office, Boston, MA.

JUDGES: NANCY GERTNER, U.S.D.J.

OPINIONBY: NANCY GERTNER

OPINION: **[*562]**

SENTENCING MEMORANDUM

January 20, 2000**[*563]** Reginald Shepard ("Shepard") pleaded guilty to one count of Felon in Possession of a Firearm, in violation of *18 U.S.C. § 922*(g). At the time of the offense, Shepard had a number of prior state criminal convictions for breaking and entering. The government argued that at least five of these convictions were "violent felonies" within the meaning of the Armed Career Criminal Act ("ACC") because they qualified as "burglaries" under *18 U.S.C. § 924*(e)(2). See U.S.S.G. § 4B1.4. Shepard disagreed. The resolution of this dispute was critical: **[**2]** Shepard faced an increase in his sentence of approximately twelve years if I adopted the government's position. n1

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n1 Under U.S.S.G. § 4B1.4, Shepard's sentencing range would increase considerably from 30-37 months to 188-235 months.

----------End Footnotes----------

The substantive issue, whether Shepard's breaking and entering convictions constitute "burglaries," raised an even more fundamental one -- how far may a court look beyond the language of the indictment to which the defendant pled guilty or of which he was convicted, to determine the character of a defendant's prior convictions.

The Sentencing Guidelines and the ACC attach substantial penalties not merely to the fact of a prior record, but to the nature of that record. Since these extraordinary consequences were never anticipated when the defendant pled guilty or was convicted in state court, they were never adjudicated by a court or jury, much less admitted to by the defendant. A sentencing court has two choices: On the one hand, she can look only to the formalities of[**3] the record -- the language of the indictment to which the defendant pled, the meaning of the jury verdict as interpreted by the jury instructions -- or the facts which the defendant admitted. On the other hand, she can try to evaluate the record post hoc, without the safeguards of a trial, to determine what the offense was "really" about -- what the police report says, what the complaint application indicated.

Both the First Circuit and the Supreme Court have chosen the former. It plainly saves judicial resources. It avoids the legal equivalent of an archeological dig into past records. More importantly, it is by far the fairest approach. As a general matter, we, as a society, reject punishing someone based on facts that were never adjudicated, particularly where the defendant had no idea that the facts would have this added resonance. As I describe below, based on the formal record, I concluded that Shepard did not qualify as an A ned Career Criminal.

But concluding that Shepard did not qualify as an Armed Career Criminal did not mean that his substantial record would be ignored. The government also moved for an upward departure pursuant to U.S.S.G. § 4A1.3 (p.s.) based on[**4] the seriousness [*564] of Shepard's criminal history. n2 Again, evaluating only the formal record of Shepard's convictions, I found that the number of convictions, their timing, and their nature, all suggest that Shepard's criminal history understated his culpability and the likelihood, of his recidivism. Accordingly, an upward departure was warranted.

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n2 Indeed, the government did so at my invitation. After I indicated that I was not inclined to find Shepard an Armed Career Criminal, I invited the government to move for an upward departure, to be argued at a second sentencing hearing.

----------End Footnotes----------

Two hearings were held. The first, on July 7, 1999, focused on the ACC issue. The government asked the Court to accept facts taken from police reports and complaint applications as evidence to support its argument that at least five of Shepard's breaking and entering convictions were really burglaries (and thus "violent felonies") for purposes of the ACC enhancement. The second, on July 14, 1999, focused on the upward departure issue. [**5] The government urged the Court to consider the number, and "sheer industrious nature," of Shepard's prior convictions in enhancing his sentence. It then sought a sentence which, in effect, would have achieved the same result as an ACC finding.

In its objections to the pre-sentence report, Shepard opposed any factual recitations beyond the face of the complaints and specifically, any reference to police reports and complaint applications.

I departed upward by two levels. I sentenced Shepard to a term of imprisonment of forty-six months, followed by three years of supervised release. Furthermore, I ordered that Shepard participate in a 500 hour Comprehensive Drug Treatment Program, and attend a Batterer's Intervention Program.

I. GUIDELINE CALCULATIONS

Base Offense Level:

The base level under U.S.S.G. § 2K2.1(a)(6)(A) is 14. n3

----------Footnotes----------

n3 [HN1] U.S.S.G. § 2K2.1(a)(6)(A) provides that the base offense level will be 14 if the defendant is a "prohibited person." A "prohibited person" is defined to include anyone who, like Shepard, is under indictment for, or has been convicted of a "crime punishable by imprisonment for more than one year." U.S.S.G. § 2K2.1 (App. Nt. 6)

----------End Footnotes----------

[**6]

Acceptance of Responsibility:

Due to Shepard's guilty plea, he is entitled to a 2 level reduction under U.S.S.G. § 3E1.1(a). Minus 2

Upward Departure:

As discussed below, I concluded that an upward departure of two levels to 14 was appropriate. Plus 2

Total Offense Level:

Shepard's total offense level of 14, and a criminal history category of VI, yields a sentencing range of 37-46 months. I sentenced him to the high end, at 46 months, and further, directed that he participate in a 500 hour Comprehensive Drug Treatment Program, and a Batterer's Intervention Program.

II. FACTS

A. Background

Shepard is a 37 year old man who has been involved with the criminal justice system for almost twenty years. As a young man, he witnessed his alcoholic father physically abuse his mother. Although his mother eventually kicked his father out when Shepard was 10 years old, she later became involved with another man who repeated the pattern, physically and emotionally abusing her, as well as Shepard and his sister. At age 16, Shepard finally moved out. He also withdrew from school, got a job as a security guard, and significantly, [**7] began using drugs.

----------Footnotes----------

Shepard's history of abuse, and his continued use of cocaine and marijuana limited his capacity to keep a job, or to maintain positive relationships. In at least [*565] three of his relationships, drug use seemed to be what the couple shared most -- in a rooming house in Mattapan, a rented apartment in Hyde Park, a Dorchester home. At the same time, perhaps the other side of drug filled days, at least four of the women obtained restraining orders against him. n4

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n4 One of these orders was related to incidents involving Kathleen Cole, Shepard's present girlfriend. In May 1998, Shepard was arrested for, among other things, assault and battery of Kathleen Cole. According to a police report, Ms. Cole reported various acts of physical abuse from a man currently living in her house. This report lead to Shepard's arrest, but these charges were eventually dropped. Ms. Cole states that Shepard was not the man in her report.

----------End Footnotes----------

In 1988, Shepard tried to stop his drug habit by entering a rehabilitation program[**8] at Dimock Detoxification Center. After only six months of staying clean, however, he returned to drug use.

At sentencing, Shepard represented to the Court that he had voluntarily stopped using drugs since 1996. During part of that period, he was in the House of Correction. After his release in 1998, his girlfriend, Kathleen Cole, confirmed that he began attending Alcoholics Anonymous/Narcotics Anonymous ("A.A./N.A.") meetings. Shepard's family, who had largely rejected him because of his drug use, as I describe below, appeared in force at the sentencing hearing to buttress the claim that he had finally addressed his problem.

B. Criminal History

Since 1980, when he was 18 years old, Shepard has been on an 18-year crime spree. n5 But while lengthy, it is also the criminal history of a drug addict -- a series of opportunistic, seemingly unplanned crimes, involving inappropriate targets with little chance of success. He is

immediately apprehended; he pleads guilty and as soon as he is released, starts again."

----------Footnotes----------

n5 The longest continuous sentence Shepard received in the House of Correction was for two years in July 1991, for Breaking and Entering in the Daytime.

The convictions during this 18 year time period include charges filed on 5/23/80 (threatening); 11/4/80 (trespassing); 2/9/81 (breaking and entering and larceny); 7/20/81 (possession Class D); 11/15/84 (assault and battery on a police officer); 6/19/85 (operating to endanger and larceny of a motor vehicle); 3/8/87 (shoplifting and trespassing); 10/13/87 (automobile offenses); 5/27/88 (automobile offenses); 11/2/88 (shoplifting); 11/21/88 (shoplifting and trespassing); 12/7/88 (shoplifting and trespassing); 3/2/89 (shoplifting); 4/18/89 (breaking and entering); 5/9/89 (threatening and possession Class B); 5/18/89 (breaking and entering); 5/23/89 (breaking and entering); 7/12/89 (breaking and entering); 7/17/89 (trespassing); 7/27/89 (trespassing); 10/11/90 (breaking and entering and possession of burglarious tools); 3/11/91 (breaking and entering); 7/18/91 (breaking and entering); 1/25/93 (threatening, trespassing, and larceny); 7/9/93 (threatening and shoplifting); 2/4/94 (malicious destruction of property and breaking and entering); 5/23/94 (knowingly receiving stolen property and threatening); 11/9/95 (breaking and entering and larceny); 2/29/96 (breaking and entering and possession of burglarious tools); 5/4/98 (threatening and malicious destruction of property); and 5/12/98 (assault and battery).

----------End Footnotes----------

[9]**

1. The Breaking and Entering Convictions

Of particular importance to this case are Shepard's eleven convictions for breaking and entering, n6 at least five of which the government argues constitute burglaries. Probation and the defense disagreed, relying only on the language in the charging documents, the criminal complaints. n7 These complaints recite the boiler-plate language of the statutes, G.L. ch. 266 §§ 16, 18. And that language covers both **[*566]** breaking and entering into a commercial structure or dwelling, which is "generic burglary," as I describe below, and breaking and entering into a vehicle or vessel, which is not. n8

----------Footnotes----------

n6 It is noted that one of these convictions -- February 9, 1981 -- was not scored for purposes of the Criminal History computation under U.S.S.G. § 4A1.2(e) (out of applicable time period).

n7 As these criminal cases were brought in Massachusetts District Court, Shepard was charged by Complaint, rather than by Indictment.

n8 [HN2] The relevant statutes provide:

Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished by imprisonment in the state prison for not more than twenty years, or in a jail or house of correction for not more than two and one-half years.

Mass. Gen. L. ch. 266 § 16 (1990). [HN3] Statute was amended in September 1995 to include "or vehicle" language.

Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years.

Mass. Gen. L. ch. 266 § 18 (1990). Statute was amended in November 1989, to include "or motor vehicle" language.

----------End Footnotes----------

[10]**

In an effort to prove the actual conduct involved, in particular the location of the crime (i.e. in a structure or a vehicle), the government supplied additional materials, such as complaint applications and police reports. While the Probation Department described the content of these materials in its amended Pre-Sentence Report ("PSR"), it did not alter its conclusion. It continued to maintain that it was bound to rely only on the formalities of the charges.

In each case, Shepard pleaded guilty to the generally worded complaint. Nothing suggested that the facts alleged in the complaint applications or the police reports were ever litigated, much less determined by a court or jury. At no point -- then or now, during the various plea colloquies, or at this sentencing -- did Shepard concede the facts on which the government now relies. Indeed, Shepard expressly contested any characterizations of these convictions that went beyond the words of the complaints.

a. April 18, 1989 n9

----------Footnotes----------

n9 Although the government's brief states that this crime occurred on May 8, 1989, the facts described suggest that it intended to discuss the event which passed on April 2, 1989.

In discussing this offense, the government relies on the PSR, and does not supply any additional documentation.

----------End Footnotes----------

[11]**

Shepard was sentenced to 18 months in the House of Correction, 6 months committed, and the balance suspended. The complaint stated that on April 2, 1989, the defendant "did break and enter in the daytime, the building, ship or vessel of Crispus Attucks Children's Center with the intent to commit a felony therein in violation of G.L. c. 266, § 18." The complaint application suggested that a building was involved, alleging that Shepard gained access to the Children's Center by breaking a window, and in so doing, he put the Director of the Center in fear.

b. May 23, 1989

The second conviction resulted in a 2 years suspended sentence and probation. On July 31, 1991, Shepard was found in violation of probation and committed to the House of Correction to serve his sentence. The complaint stated that on May 6, 1989, "the defendant did break and enter in the night time the building, ship, vessel, or vehicle, the property of Jerri Cothran, with intent to commit a felony therein, in violation of G.L. c. 266 § 16."

The complaint application and the Boston Police report implied that a home was involved. They alleged that Shepard gained entry by breaking down a cellar door, and**[**12]** was then observed inside the pantry by the owner of the house.

c. March 29, 1991

For this conviction, Shepard was committed to the House of Correction for one year. The complaint stated that on March 11, 1991, "the defendant did break and enter in the night time, the building, ship, vessel or vehicle the property of Fretters, **[*567]** with intent to commit a felony therein in violation of G.L. ch. 266 § 16."

The Watertown Police report suggested that the site was a commercial building. The report stated that two managers of Fretters were in the stockroom when they observed the back door open and Shepard enter. According to both employees, the door was locked, and they believed that to enter, Shepard used a key that he did not return to the store following his termination from employment there several weeks before.

d. July 18, 1991

On this conviction Shepard was sentenced to two years in the House of Correction. The complaint stated that on July 18, 1991, "the defendant did break and enter in the day time the building, ship or vessel of Monica Collins with the intent to commit a felony therein, in violation of G.L. ch. 266 § 16."

The Boston Police report alleged that**[**13]** the officers responded to a radio call about a suspect in the hallway of a particular apartment building in Dorchester. Upon arrival, the officers observed Shepard walking away from the area carrying items from a particular apartment. Officers found that a panel on the third floor,

front door had been broken, exposing the inside door lock.

e. February 4, 1994

The final conviction resulted in a two year sentence, six months committed and the balance suspended. The complaint set forth that on February 3, 1994, "the defendant did break and enter in the day time the building, ship or motor vehicle or vessel of Russell McGaugh with intent to commit a felony therein, in violation of G.L. ch 266 § 18."

The police report stated that Shepard was observed attempting to gain entry into the stated address by turning several doorknobs. A police officer went to the rear of the property and observed Shepard, with both hands through the glass partition, attempting to gain entry through another door. Upon seeing the police officer, Shepard fled, but was soon apprehended and placed under arrest.

2. The Remainder of Shepard's Record

Until the incident leading to the instant[**14] plea to Felon in Possession of a Firearm, Shepard was never charged with, or convicted of any crime involving the use or possession of a weapon. No weapon appears to have been involved in any of his prior offenses. Indeed, the vast majority of his offenses are within the jurisdiction of the state district court, for trespass, larceny, receiving stolen property, shoplifting, as well as breaking and entering.

C. This Incident

On October 17, 1995, an Alcohol, Tobacco and Firearms ("ATF") agent, acting in an undercover capacity, met Shepard regarding a prearranged deal to sell firearms. During the meeting, which was recorded on tape, Shepard completed a hand-to-hand sale of a Glock 17, 9 mm pistol for $600.00, and various rounds of ammunition for an additional $20.00. On March 3, 1999, Shepard entered a plea of guilty to one count of Felon in Possession of a Firearm, in violation of *18 U.S.C. § 922*(g).

Defense counsel maintained that the deal was set up by an informant who needed to make deals to minimize his own sentence. Shepard, she suggested, because of his drug use, was vulnerable. It is clear that Shepard had not been targeted prior to this transaction. [**15] He simply fell into the net.

D. Other Facts

At the sentencing hearing, Shepard claimed that he had begun to "turn his life around." Influential in this change was a woman, Kathleen Cole, whom he met in 1996 while he was at Plymouth House of [*568] Correction. Cole is a certified Charge Nurse at Sunrise Care in Randolph, MA, and a certified physical trainer. During the period between March 1998 and September 1998 while he was out of jail, Shepard lived with Cole, managed to secure employment, attend A.A./N.A. programs and began counseling. n10 Since his detention at Wyatt on these charges, Cole moved to an apartment nearby. She visits him as often as is permitted and the couple writes to one another daily.

----------Footnotes----------

n10 He reported that instead of medicating himself with illegal drugs to deal with anger and depression, he took prescribed medications, which appear to be working.

----------End Footnotes----------

Finally, Shepard remarked on how his personal changes were also influenced by his rekindled relationship with his family, after many years[**16] of conflict because of his drug abuse. Indeed, he represented that in his lengthy criminal history not once had his family ever attended a court hearing. During the sentencing hearing on these charges, however, his Godmother, his sister, his niece, his sponsor at N.A., and his girlfriend were present.

III. LEGAL ANALYSIS

A. Armed Career Criminal

The government maintained that Shepard was subject to an enhanced sentence under the provisions of *18 U.S.C. § 924*(e). Specifically, it contended that Shepard qualified as an Armed Career Criminal pursuant to U.S.S.G. § 4B1.4(a). Under this provision, Shepard's base offense level would increase to 33, from 14. See U.S.S.G. § 4B1.4(b)(3)(B).

[HN4] Pursuant to U.S.S.G. § 4B1.4 and *18 U.S.C. § 924*(e), a defendant is determined to be an Armed Career Criminal if the following conditions exist: (1) the instant offense of conviction is a violation of *18 U.S.C. § 922*(g), and (2) the defendant has at least three prior convictions for a "violent felony" or "serious drug offense" committed on occasions different from one another. See U.S.S.G. § 4B1.4[**17] (App. Nts).

The term "violent felony," as set forth in [HN5] *18 U.S.C. § 924*(e)(2), provides:

The term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use of, carrying of a firearm, knife or destructive device that would be punishable by imprisonment for such term if committed by an adult, that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise, involves conduct that presents a serious potential risk of physical injury to another. n11

----------Footnotes----------

n11 The government relied only on the argument that Shepard's prior convictions constituted "burglaries" under *18 U.S.C. § 924*(e)(12).

----------End Footnotes----------

In *Taylor v. United States, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990)*, the Supreme Court considered whether the defendant's[**18] predicate offenses qualified as "burglary" as defined in *18 U.S.C. § 924*(e). Not content to rely on how each state might define "burglary," the Court defined generic "burglary" as the "unlawful and unprivileged entry into or remaining in, a building or structure, with intent to commit a crime." See *495 U.S. at 599*. In order to determine whether the defendant was convicted of such an offense, the Court held that [HN6] a sentencing court should narrow its inquiry to the fact of conviction, and whether the statute of conviction included the generic elements, rather than examining the facts underlying the convictions. This, it dubbed, was the "categorical" approach (which I have described as focusing on the formalities of the record). See *Taylor, 495 U.S. at 600; United States v. Damon, 127 F.3d 139, 141, 142 (1st Cir. 1997)*. n12

----------Footnotes----------

n12 Following Taylor, the First Circuit's analysis of predicate offenses has generally utilized this "categorical" approach. See e.g., *Damon, 127 F.3d at 142* (citing *United States v. Meader, 118 F.3d 876, 881-83 (1st Cir. 1997); United States v. Winter, 22 F.3d 15, 18 (1st Cir. 1994); United States v. De Jesus, 984 F.2d 21, 23 (1st Cir. 1993)*).

----------End Footnotes----------

[**19] [*569]

To be sure, the Taylor court noted there was a problem when a single state statute swept beyond the elements of generic burglary, including within it breaking and entering in places other than buildings or structures (namely vehicles or vessels), and where the defendant's plea tracks the statute. See *495 U.S. at 599; Damon, 127 F.3d at 142*. In such a case, while the sentencing judge may not hold a mini-trial on the particular facts underlying the prior offense, see *United States v. Dueno, 171 F.3d 3, 4 (1st Cir. 1999)*(citing *Damon, 127 F.3d at 144; Meader, 118 F.3d at 882)* he or she may "peek beneath the coverlet" of the formal language to ascertain whether the conviction was for a violent or a non-violent crime. See *Dueno, 171 F.3d at 4* (citing *Winter, 22 F.3d at 18)*. The question raised is how far that "peek" can go.

Not very far, is the answer; the exception to the categorical approach is a limited one. See *Taylor 495 U.S. at 600-602; Damon, 127 F.3d at 142-46*. The Court may consult "undisputed" and "accurate, judicially noticeable[**20] sources" for further guidance. See *Damon 127 F.3d at 145, 147*. [HN7] If the defendant was convicted after a trial, the court is permitted to consider what the jury instructions suggested about the verdict. If the defendant pled, the court may consider what he admitted to at his plea. See *Damon, 127 F.3d at 142; United States v. Harris, 964 F.2d 1234, 1236 (1st Cir. 1992)* (a court may consider the guilty plea when no jury instructions are available). Finally, if the relevant facts contained in the PSR are uncontested, the court may consider these as further admissions by the

defendant. See *Dueno, 171 F.3d at 7; Harris, 964 F.2d at 1236-37.*

In this case, the breaking and entering statute under which Shepard pled guilty is the hybrid kind, covering conduct which constitutes "generic burglary," and conduct which does not. n13 See *Taylor, 495 U.S. at 598; Dueno, 171 F.3d at 5* (refusing to find that all conduct described by *Mass. Gen. L. ch. 266 § 16* is violent); cf. *Harris, 964 F.2d at 1236* (assuming in dicta that breaking into and entering a vehicle is[**21] not a violent felony under the ACC). Each complaint does no more than mirror the statutory language. As a result, the government urges this Court to "peek" further to ascertain whether Shepard's crimes can be categorized as burglaries. The complaint applications and police reports, the government argued, suggested that the offenses involved breaking and entering into a "building" on all five occasions. Shepard objected, claiming that this was the very "archaeological dig" that the Supreme Court rejected.

----------Footnotes----------

n13 For statutory language, see supra note 8.

----------End Footnotes----------

I agreed with Shepard. Police reports and complaint applications do not meet the narrow exception to the categorical approach. They contain allegations that were never adjudicated before a judge or jury, never admitted by Shepard. In fact, there is no indication that the sentencing judge in the original case even had any of these documents available when he or she sentenced Shepard. See *Dueno, 171 F.3d at 6* (noting that the government provided[**22] no documents which had been before the judge when the plea was accepted).

No plea colloquies or plea agreements were offered to suggest that Shepard adopted one version of the facts rather than another for each of the convictions. Moreover, because Shepard objected to the factual representations in the PSR, the government cannot rely on the characterizations found therein. See *Harris, 964 F.2d at 1236-37.*

In fact, not only did Shepard not litigate these facts, he had no idea he had to do so. These facts -- the location of the breaking [*570] and entering -- were not necessary to his state plea. It is only now, years later, that they seem central because of a federal sentencing regime enacted years after Shepard pled.

Contrast Shepard's situation with that of a federal defendant pleading guilty today. Now, federal defendants who plead guilty make strategic decisions about which facts to contest and which to accept, carefully considering the impact their admissions will have on the ultimate sentence. The plea colloquy has assumed new significance, which it never had in the state court.

To attach such importance to facts neither litigated nor conceded violates the[**23] policies articulated by the Supreme Court in Taylor, and subsequent First Circuit precedent. n14 See *Taylor, 495 U.S. at 600-602* (unfair to impose a sentencing enhancement based on the federal court, rather than the state court's review of the facts); *Dueno, 171 F.3d at 6* (sentence defendant only for those specific "prior crimes of which he was convicted by a trier of fact or by his own admissions"). n15

----------Footnotes----------

n14 In Damon, the First Circuit articulated five important policy considerations supporting the categorical analysis. See *127 F.3d at 145-146.* First, Congress intended the Guidelines themselves to take on a categorical approach to sentencing. Following such an approach leads to like cases receiving like sentences. See *id. at 145.* Second, using a categorical approach makes sense administratively as it only requires the court to look to readily available sources of undisputed information. Alternatively, a minitrial on the facts would impose "an onerous burden, freighted with unusual evidentiary difficulties," which are time consuming and could be unfair. *Id. at 146* (citing Taylor). Third, the court found that the categorical approach honors the choice of the state in its decisions concerning which crimes to prosecute and how plea bargains should be negotiated. Fourth, the categorical approach is more or less evenhanded. On the one hand, in cases like this one, the approach may lead to lesser sentences than would result if the actual conduct could be considered. On the other hand, the approach may lead to higher sentences in other cases where a certain crime is categorically considered a "violent felony" even if the actual conduct exhibited no such violence. See id. Finally, the Court emphasized that this is a sentencing enhancement. The defendant has already been punished once for his earlier offenses. The fact that the Court is not permitted to consider the underlying conduct does not mean that the defendant somehow escapes punishment altogether. See id.

[**24]

n15 I have raised like concerns before, in *United States v. Footman, 66 F. Supp. 2d 83,* In Footman I addressed the language in the Guidelines which appeared to permit a court to look at prior criminal conduct in evaluating criminal history, and not merely prior criminal convictions. U.S.S.G. § 4A1.3(e) permits the court to consider "prior similar adult criminal conduct not resulting in a criminal conviction," so long as the information is "reliable." U.S.S.G. § 4A1.3 (Background). This section refers only to an upward departure because of the adequacy of criminal history, which is- a discretionary judgment on the part of the judge. It does not refer to the Armed Career Criminal provisions of U.S.S.G. § 4B1.4 where the consequences of a finding of a prior violent felony are automatic and draconian. Second, in Footman, I added that just because a judge is permitted to consider this information does not mean he or she should do so:

> Once one ventures past formal convictions, and formal sentences, one is in troubling territory. How can the court reconstruct prosecutions long past? Should the court essentially retry the past conduct, or rely on police reports which may well be skewed? And if a matter has been dismissed, or worse, resulted in an acquittal, how can the court, many years hence, substitute its judgment for that of the original decision-maker?
>
> *Footman, supra 66 F. Supp. 2d at 100.*

----------End Footnotes----------

[**25]

The government concedes that without the police reports or complaint applications it cannot determine the precise conduct to which Shepard actually pled guilty. Accordingly, I found insufficient evidence to conclude that Shepard's three of the five guilty pleas constituted crimes of generic burglary. See U.S.S.G. § 4B1.4; *18 U.S.C. § 924*(e). As such, the Armed Career Criminal enhancement did not apply.

B. Inadequate Criminal History Category

The government argued that an upward departure is warranted and recommended [*571]a departure of twelve levels to an offense level of 24. Two questions were raised -- the fact of an upward departure and the amount.

1. Whether an Upward Departure is Warranted

[HN8] The Commission, pursuant to its authority under the Sentencing Reform Act, determined that a defendant's "past criminal conduct" n16 is directly relevant to the purposes of sentencing: An individual "with a record of criminal behavior" is more culpable than a first offender. Moreover, "General deterrence" requires that a message be sent that "repeated criminal behavior" will aggravate the punishment. n17 Finally, the commission suggests a criminal [**26]record is correlated with recidivism on the one hand, and the limited likelihood of rehabilitation on the other. n18

----------Footnotes----------

n16 U.S.S.G. Ch. 4, Intro. Comment.

n17 Id.

n18 Id.

----------End Footnotes----------

U.S.S.G. § 4A1.1 attempts to identify the factors which correlate with these characteristics. [HN9] For the most part, the criminal history score is keyed to the length of the sentence that the individual received in state court. n19 Presumably, the longer the sentence, the more serious the underlying conduct must have been. Category

VI, however, is the highest category, reserved for anyone with a criminal history score of 13 or more.

----------Footnotes----------

n19 In addition, the score is increased if the offense was committed while on supervision, or shortly after being released from prison. See U.S.S.G. § 4(A)1.1 (d)(e).

----------End Footnotes----------

There are serious limitations with the approach which the[**27] Guidelines recognize. Policy statement U.S.S.G. § 4A1.3 (p.s.) suggests that for an egregious criminal record, the top guideline range, Criminal History Category VI, may not always be adequate to reflect the seriousness of the defendant's criminal history. See U.S.S.G. § 4A1. 3 (p.s.) Moreover, because of the way convictions are scored, an individual with five prior sentences for very large scale fraud, may have the same number of criminal history points (because of the time he or she received for each), as another who had ten small offenses for which he or she received lesser sentences per case. The former would have a far more serious criminal record, warranting an upward departure. See id.

The government called for an upward departure on a number of grounds. It relied on the same argument as it did in insisting on ACC status, namely that some of Shepard's breaking and entering convictions in reality comprise burglaries which were "violent felonies." But as noted above, I did not make that finding.

Second, the government looks to the sheer number of convictions and the general nature of his criminal habits to support an increase.

The general methodology, which I outlined[**28] in *United States v. Footman, supra* (upward departure) on the one hand, and *United States v. Leviner, 31 F. Supp. 2d 23 (D.Mass. 1999)*(down ward departure) on the other, is as follows:

. . . What is it about the [criminal history] score which created the under (or over) valuation of the record?: (i) prior sentences not counted in computing criminal history (e.g., foreign sentences), (ii) prior sentences of "substantially more than one year" that derive from independent crimes on different occasions, see § 4A1.3(a) and (b); (iii) the timing of convictions - did they follow closely one after another, or while another charge was pending, see U.S.S.G. § 4A1.3 (d); and (iv) the nature of the convictions, - e.g., assaultive behavior or non-violent conduct.

Leviner, 31 F. Supp. 2d at 32-33.

Here, categories (iii) and (iv) as described in Leviner, are significant. Shepard's criminal history score is 39, three times the number triggering Category VI. [*572] Moreover, the timing of the convictions bespeaks someone who is out of control - committing one crime after another while on supervision, shortly after being released.

Shepard, [**29] however, emphasizes the nature of the convictions. He has never been charged with offenses that might have warranted a Superior Court indictment as opposed to a complaint in District Court. None of his prior offenses involved firearms; most are shoplifting, trespassing, motor vehicle infractions, receiving stolen property, breaking and entering.

But while the offenses did not involve firearms per se, and may not formally be "violent crimes" or "burglaries" under U.S.S.G. § 4B1.4, the record, however characterized, still suggests the likelihood of recidivism. One does not have to "peek beneath the coverlet" to conclude this.

2. Extent of Departure

a. Degree of Departure

[HN10] In calculating the appropriate offense level when the Criminal History Category is already VI, the Guidelines instruct the Court to depart by moving incrementally down the sentencing table to the next higher offense level until it finds the range appropriate for the case. See U.S.S.G. § 4A1.3 (p.s.).

[HN11] In determining "appropriateness," I am guided by the statute creating the Federal Sentencing Guidelines, the Sentencing Reform Act. It directs me to impose a sentence "sufficient, but not greater[**30] than necessary, to comply with the purposes set forth. . ." *18 U.S.C. § 3553*(a).

While Shepard's record suggests recidivism, it also suggests an out of control drug addict. Shepard gets out of jail, and returns to drugs, and the crimes he must commit in order to afford the drugs. Whatever sentence I impose must also include serious attention to Shepard's addiction. I have been told by the Probation Department that a sentence in the Guideline range of 30-37 months would not qualify Shepard for participation in the intense drug treatment program of the Bureau of Prisons. n20 Only a sentence at 46 months or more would suffice.

----------Footnotes----------

n20 [HN12] The Bureau of Prisons considers only the amount of time in its custody in calculating the prerequisites for the intensive drug treatment program. A guidelines sentence, minus the amount already served in pre-trial detention, will not suffice.

----------End Footnotes----------

Shepard has never before served a federal sentence in a prison far from home. He has never served more than 2.5 years, and[**31] never in any institution other than the House of Correction. A departure to offense level 14, a Guideline range of 37-46, and a sentence at the high end, would be "sufficient," but not "greater than necessary" to meet all purposes of the Sentencing Reform Act. n21

----------Footnotes----------

n21 The purposes set forth in [HN13] *18 U.S.C § 3553*(a)(2) are:

(A) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense;
(B) to afford adequate alternative to criminal conduct;
(C) to protect the public from further crimes of the defendant, and;
(D) to provide the defendant with needed educational or vocational training, medical care or other corrective treatment in the most effective manner.

----------End Footnotes----------

As such, I sentenced Shepard as follows:

I departed up two levels, to an offense level of 14. The Guideline range for this level at Criminal History Category VI is 37-46 months. I sentenced Shepard to 46 months in prison, with three years supervised release. [**32] In addition, I recommended that Shepard participated in the 500 hour Intensive Drug Treatment program in the Bureau of Prisons and directed him to send periodic reports to me of his progress.

-SO ORDERED.

Dated: January 20, 2000

NANCY GERTNER, U.S.D.J.

APPENDIX B

United States v. Shepard,
December 19, 2000 Order of Court
Denying Motion for Reconsideration
and
Reconsideration En Banc

United States v. Shepard,
November 24, 2003 Order of Court
Denying Motion for Reconsideration
and
Reconsideraton En Banc

United States Court of Appeals
For the First Circuit

No. 99-2167

UNITED STATES,

Appellant,

v.

REGINALD SHEPARD,

Defendant, Appellee.

Before

Torruella, Chief Judge,
Selya, Boudin, Stahl, Lynch, and Lipez, Circuit Judges,
and Keeton, District Judge. **

ORDER OF COURT
Entered December 19, 2000

The petition for renearing addresses a jurisdictional issue raised by appellee on appeal but not addressed explicitly in the panel's decision. Petitioner stated that the relevant provision of the jurisdictional statute invoked by the government provides for appellate review of "an otherwise final sentence if the sentence . . . was imposed in violation of law." 18 U.S.C. § 3742(b). The petition argued that the district court's ruling in this case was discretionary, and that the panel opinion thus does not correct a violation of law. This is not the case. As the panel opinion makes clear, the district court made a legal ruling. There was

jurisdiction to hear the appeal under § 3742(b). The petition for panel rehearing is denied.

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges voting that the case not be heard en banc, it is ordered that the petition for rehearing en banc be denied.*

By the Court:

PHOEBE MORSE
Clerk

*Judge Selya and Judge Lynch dissented from the denial of the petition for rehearing en banc.
** Judge Keeton, District Court Judge of the district of Massachusetts, sitting by designation
[cc: Messrs. Pellegrini, Chaitowitz, Zacks, Feeley and Thomason]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 02-1216

UNITED STATES,
Appellant,

v.

REGINALD SHEPARD,
Defendant, Appellee.

Before

Boudin, Chief Judge,
Torruella, Selya, Lynch, Lipez and Howard, Circuit Judges.

ORDER OF COURT

Entered: November 24, 2003

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

RICHARD [illegible] NOVAN
Clerk.

[cc: Ms. Thompson and Ms. Young]

APPENDIX C

United States v. Shepard,
December 31, 2003 Order of Court
Staying Mandate Pending Petition for Certiorari

United States Court of Appeals
For the First Circuit

No. 02-1216

UNITED STATES OF AMERICA,
Appellant,

v.

REGINALD SHEPARD,
Defendant, Appellee.

Before
Boudin, Chief Judge,
Torruella and Lipez, Circuit Judges.

ORDER OF COURT

Entered: December 31, 2003

On motion of appellee Reginald Shepard for an order staying mandate, the issuance of the mandate is hereby stayed pending the filing of a timely petition for certiorari and, if a timely petition for certiorari is filed, pending a resolution of the petition by the Supreme Court. If the petition for certiorari is denied, the mandate shall issue forthwith. If the petition is granted, the stay of mandate shall continue until disposition of the case by the Supreme Court. Counsel for appellee Shepard is directed promptly to notify the Clerk of this court both of the filing of any such petition for certiorari and its disposition.

It is so ordered.

By the Court:

MARK R. SYSKA

Mark R. Syska, Chief Deputy Clerk.

[Certified copies to Hon. Nancy Gertner, Mr. Tony Anastas, Clerk, United States District Court for Massachusetts. Copies to Ms. Pellegrini, Ms. Young, Ms. Chaitowitz and Ms. Thompson.]

APPENDIX D

18 U.S.C. § 924(e)

UNITED STATES CODE SERVICE

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*** CURRENT THROUGH P.L. 106-580, APPROVED 12/29/00 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 44. FIREARMS

18 USCS § 924 (2000)

§ 924. Penalties

* * * *

(e) (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act *(21 U.S.C. 801* et seq.), the Controlled Substances Import and Export Act *(21 U.S.C. 951* et seq.), or the Maritime Drug Law Enforcement Act *(46 U.S.C. App. 1901* et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act *(21 U.S.C. 802))*, for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

RESPONSE REQUESTED

ORIGINAL (4)

Supreme Court, U.S.
FILED
MAY - 7 2004
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No. 03-9168

IN THE SUPREME COURT OF THE UNITED STATES

REGINALD SHEPARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, when a state offense embraces conduct that constitutes generic burglary under Taylor v. United States, 495 U.S. 575 (1990), as well as conduct that does not, certified copies of police reports and complaint applications contained in state court files may be used to determine that the defendant's guilty pleas were to generic "burglar[ies]" and thus "violent felon[ies]" within the meaning of the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 348 F.3d 308. The opinion of the district court (Pet. App. A8-A18) is reported at 181 F. Supp. 2d 14. A prior opinion of the court of appeals (Pet. App. A19-A29) is reported at 231 F.3d 56. A prior opinion of the district court (Pet. App. A30-A41) is reported at 125 F. Supp. 2d 562.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 2003. A petition for rehearing was denied on November 24, 2003 (Pet. App. B3). The petition for a writ of certiorari was filed on February 23, 2004 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following his plea of guilty in the United States District Court for the District of Massachusetts, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). The district court sentenced him to 46 months of imprisonment, to be followed by three years of supervised release. See Pet. App. A32; United States v. Shepard, 125 F. Supp. 2d 562 (D. Mass. 2000) (Shepard I). On the government's appeal, the court of appeals vacated petitioner's sentence and remanded for resentencing. See Pet. App. A21; United States v. Shepard, 231 F.3d 56, 70 (1st Cir. 2000) (Shepard II). This Court denied review. See Shepard v. United States, 534 U.S. 829 (2001).

On remand, the district court imposed the same sentence. See Pet. App. A18; United States v. Shepard, 181 F. Supp. 2d 14 (D. Mass. 2002) (Shepard III). On the government's second appeal, the court of appeals again vacated petitioner's sentence and remanded for resentencing. See Pet. App. A7; United States v. Shepard, 348 F.3d 308 (1st Cir. 2003) (Shepard IV).

1. On October 17, 1995, petitioner sold a Glock 17, 9 mm pistol and various rounds of ammunition to an undercover agent of the Bureau of Alcohol, Tobacco, and Firearms. Petitioner suggested that the agent remove the serial number from the pistol because it was going to be reported as stolen. See Gov't C.A. Br. 3.

2. On March 3, 1999, petitioner pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2. On July 14, 1999, petitioner was

sentenced to 46 months of imprisonment, to be followed by three years of supervised release. Id. at A32.

The principal issue at sentencing was whether petitioner was subject to a 15-year minimum term of imprisonment under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). The ACCA's enhanced sentence applies to any person who is convicted as a felon in possession of a firearm under 18 U.S.C. 922(g) and who has three prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. 924(e)(1). A "violent felony" is defined to include, among other crimes, "burglary." 18 U.S.C. 924(e)(2)(B)(ii). Although the ACCA does not define "burglary," this Court has held that, as used in the ACCA, the term means "generic" burglary, which is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Taylor v. United States, 495 U.S. 575, 598 (1990).

As the district court noted in its initial opinion, "[s]ince 1980, when he was 18 years old, [petitioner] has been on an 18-year crime spree." Pet. App. A33. Petitioner's numerous prior convictions, ranging from breaking and entering to assault and battery, were set forth in his presentence report (PSR). See Gov't C.A. Br. 3-4; Pet. App. A33 & A34 n.5. Relying on five of petitioner's prior breaking and entering convictions, the government sought to establish that petitioner was an armed career criminal because he had previously committed at least three violent felonies in the form of burglary. All of the convictions on which

the government relied involved guilty pleas by petitioner to violations of either Mass. Gen. Laws ch. 266, § 16, which prohibits the breaking and entering into a "building, ship, vessel or vehicle" during the night, or Mass. Gen. Laws ch. 266, § 18, which prohibits the breaking and entering into a "building, ship or motor vehicle or vessel" in the daytime. The PSR described the convictions as follows:

> 1. In April 1989, petitioner broke into the Crispus Attucks Children's Center by breaking a window, put the director in fear, and stole certain items. He was sentenced to a term of 18 months in the House of Correction, with six months to be served in custody and the balance suspended for approximately 18 months. See PSR ¶¶ 54-55.
>
> 2. In May 1989, petitioner broke into a personal residence at about 3:00 a.m. He was sentenced to two years in the House of Corrections, with the sentence suspended, and two years' probation. In July 1991, he was found to be in violation of his probation and the suspended sentence was imposed. See PSR ¶¶ 58-59A.
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> 3. In March 1991, petitioner opened and entered a locked storeroom door at a commercial establishment, apparently with a key he had kept after his employment at the store had been terminated. He received a one-year custodial sentence. See PSR ¶¶ 68-69A.
>
> 4. In July 1991, police saw petitioner walking away with a pink pillowcase containing a VCR and a telephone, all of which had been taken from an apartment at 258 Norwell Street. A panel on the third-floor front door had been broken to gain access. Petitioner was sentenced to two years' imprisonment. See PSR ¶¶ 70-71A.
>
> 5. In February 1994, a police officer, apparently responding to an attempted break-in, saw petitioner with both hands extended through a glass partition, attempting to gain entry to an inner door in a building. Petitioner was sentenced to two years in the House of Correction, with six months to be served in custody and the balance suspended for a year and a half. See PSR ¶¶ 76-77A.

For four of the convictions, the government argued that the district court could determine that the convictions were for

"generic" burglary by examining certified copies of police reports and complaint applications included in the state court files for the convictions. See Pet. App. A3, A22. Under Massachusetts criminal procedure, "the 'complaint' is the final step in the charging process roughly equivalent to a federal information." Id. at A3 (citing 1 Mass. Crim. Practice §§ 4.1-4.2 (1998)). The complaint is issued by a magistrate based on a complaint application, which is usually filed by a police officer and incorporates or is accompanied by a police report. Ibid. "The application is customarily sworn and is automatically given to defendants at their arraignments," so Massachusetts courts "can presume that defendants know the information contained in police reports." Ibid. (citing Commonwealth v. Brown, 748 N.E.2d 972, 981 (Mass. App. Ct. 2001)). Although petitioner did not contest the PSR's recitation of the facts underlying the prior convictions, he objected to reliance on the police reports and complaint applications. Id. at A22; Gov't C.A. Br. 7; see Pet. App.4.

The district court rejected the government's request for an enhancement under the ACCA. Pet. App. A36-A39. The court ruled that the complaint applications and police reports could not be considered because they contained facts "neither litigated nor conceded" by petitioner and to consider them would therefore be inconsistent with this Court's decision in Taylor. Id. at A38. In Taylor, this Court held that, in order to determine whether a prior conviction is for generic burglary, and thus a violent felony under the ACCA, the sentencing court should generally "look only to the

fact of the conviction and the statutory definition of the prior offense." 495 U.S. at 602. The Court also stated, however, that the sentencing court may conduct a further inquiry when the statutory definition of the prior offense encompasses both conduct that is generic burglary and conduct that is not generic burglary. In that situation, the Court held, the sentencing court may examine "the charging paper and the jury instructions" to determine whether the jury must have found all the elements of generic burglary in order to convict the defendant. Ibid. If so, the prior conviction counts as one for the "violent offense" of generic "burglary." See ibid.; 18 U.S.C. 924(e). Although Taylor did not expressly address what documents could be considered when a defendant pleads guilty and there are therefore no jury instructions, the district court concluded that Taylor permits consideration of a plea colloquy or plea agreement but not the police reports and complaint applications at issue here. Pet. App. A37-A38.

3. The government appealed, and the court of appeals vacated petitioner's sentence and remanded. Pet. App. A19-A29. The court of appeals noted that this Court in Taylor did not address the extent to which a sentencing court can go beyond the fact of conviction for the purpose of determining an ACCA enhancement when the defendant has pleaded guilty to a crime that encompasses both generic and non-generic burglary. Id. at A24. Considering that question in light of its own precedent, the court of appeals held that there is no "absolute bar" to consideration of police reports and complaint applications when the sentencing court is trying to

determine whether a defendant pleaded guilty to an offense that constitutes "burglary" under the ACCA. Id. at A27.

The court of appeals explained that the question whether the prior conviction constitutes burglary under the ACCA does not turn on whether the defendant explicitly admitted to the conduct constituting generic burglary before or during the sentencing. Pet. App. A26. Instead, the question turns on whether the defendant and the government both believed that the defendant was pleading guilty to conduct constituting generic burglary. Ibid. The resolution of that inquiry, the court concluded, "can be made on the basis of sufficiently reliable evidence independent of a fact-specific admission." Ibid. Because the district court had not conducted "the required analysis of whether the documents before it constituted sufficiently reliable evidence of the government and [petitioner's] shared belief that [petitioner] was pleading guilty to the unlawful entry of a building," the court of appeals vacated petitioner's sentence and remanded for resentencing. Id. at A29.

4. On remand, the district court reimposed its previous sentence. See Pet. App. A8-A18. As directed by the court of appeals, the district court considered the police reports and complaint applications submitted in the initial sentencing, as well as reports and applications for two additional convictions submitted by the government at the resentencing (see id. at A4). The court found that the documents did not provide reliable evidence bearing on the "central question" before the court, which

the court identified as what offenses petitioner had pleaded guilty to in the state courts. Id. at A10. The court explained that, in an affidavit, petitioner had maintained that the police reports underlying his prior convictions were not read to him or discussed at his plea proceedings and that he did not admit to the facts contained in the reports at his plea hearings. Id. at A11. The government, the court observed, had offered no other version of the state court proceedings. Id. at A12. As a result, the court said, it was unable to conclude by a fair preponderance of the evidence that petitioner had pleaded guilty to unlawful entries into buildings with the intent to commit a crime. Id. at A13-A18. The court therefore reimposed the 46-month sentence that it had imposed previously. Id. at A18.

5. The government again appealed, and the court of appeals again vacated petitioner's sentence and remanded for resentencing. Pet. App. A1-A7. The court first observed that there is "an air of make-believe" about this case, because no one seriously disputes that petitioner "in fact broke into half a dozen or more buildings," and he is "just the kind of burglar whom Congress had in mind" when it enacted the ACCA. Id. at A4. The court then noted that, for practical reasons of administration, this Court had ruled in Taylor that sentencing courts could not conduct a de novo inquiry into the conduct underlying a prior conviction in order to determine whether that conviction is a predicate offense for an ACCA enhancement, but rather should focus on whether the conviction was necessarily for generic burglary or some other crime of

violence. Ibid. The problem, the court said, is one that Taylor recognized, namely, that state statutes sometimes embrace both conduct that is generic burglary and conduct that is not. Ibid. The court explained that, in addressing the problem in Taylor, this Court had said that, in cases where prior convictions resulted from jury trials, a sentencing court could look at charging papers and jury instructions in order to determine whether the defendant had been convicted of generic burglary. But, the court of appeals added, this Court had not ruled out consideration of other documents in cases where prior convictions had resulted from guilty pleas. Id. at A5. The court then reviewed two of its own cases, which established that, where prior convictions based on guilty pleas are offered as predicate offenses for an ACCA enhancement, the sentencing court may consider other documents, including a "reliable PSR," to determine whether both the government and the defendant believed that a generically violent crime was involved. See Pet. App. A5-A6 (citing United States v. Harris, 964 F.2d 1234, 1236-1237 (1st Cir. 1992); United States v. Dueno, 171 F.3d 3, 7 (1st Cir. 1999)).

Turning to the instant case, the court of appeals noted that "the reliability of PSR descriptions is not even an issue" because the government was relying on complaint applications and police reports from "the original state court case files." Pet. App. A6. Petitioner, the court noted, had been given a full opportunity to contest the descriptions in the documents and had not done so. Ibid. All petitioner had stated was "that he had not specifically

admitted in open court to breaking into [buildings] and that the underlying police reports were not read to him at the plea hearings." Id. at A7. In those circumstances, the court reasoned, it is so unlikely as to be nearly impossible that "the police reports were mistaken" as to the locations of four of the six crimes or that petitioner had pleaded guilty based on anything other than his burglaries of buildings. See id. at A6-A7. The court therefore concluded that it was "clearly erroneous" for the district court to find that petitioner had not pleaded guilty to at least three burglaries of buildings. Id. at A7. The court therefore vacated petitioner's sentence and remanded the case so that the district court could impose the mandatory minimum ACCA sentence. Ibid.

ARGUMENT

Petitioner contends (Pet. 15-38) that the court of appeals erred in holding that complaint applications and police reports from the court files of prior state convictions may be used to determine that plea-based prior convictions were for crimes that constitute generic burglary under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). Petitioner further contends that the holding of the court of appeals conflicts with Taylor v. United States, 495 U.S. 575 (1990), and with decisions of other courts of appeals. Those contentions lack merit, and this Court's review is therefore not warranted.

1. a. Under the ACCA, a defendant who is convicted of violating 18 U.S.C. 922(g) is subject to an enhanced sentence if he

has three or more previous convictions for violent felonies or serious drug offenses. 18 U.S.C. 924(e). The term "violent felony" is defined to include "burglary." 18 U.S.C. 924(e)(2)(B)(ii). In Taylor, this Court held that a burglary qualifies as a "violent felony" under Section 924(e) if it meets the "generic" definition of burglary, which the Court described as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." 495 U.S. at 598.

The Court also addressed how sentencing courts should determine whether a defendant was convicted of generic burglary. Taylor, 495 U.S. at 599-602. The Court held that sentencing courts "generally" should "look only to the fact of conviction and the statutory definition of the prior offense." Id. at 602. Thus, if the state statute precisely corresponds with the generic definition of burglary (or is narrower, but contains all the critical elements), the conviction qualifies as "burglary" for purposes of Section 924(e). Id. at 599. At the same time, the Court recognized that some state statutes might be drawn more broadly, so as to cover both conduct that is generic burglary and conduct that is not. Ibid. For example, the Court explained, a single burglary statute might proscribe both breaking into an automobile, which would not constitute "generic" burglary, and breaking into a building, which would. Id. at 599, 602. The Court stated that, in such a case, the sentencing court may properly "go beyond the mere fact of conviction" and consult "the charging paper and jury

instructions" to ascertain whether the defendant "was charged only with a burglary of a building" or "the jury necessarily had to find an entry of a building to convict." Id. at 602.

As the court of appeals in this case noted (Pet. App. A5, A24), Taylor did not address how a sentencing court is to determine whether a prior conviction is for generic burglary in a case in which the statute covers both generic burglary and non-generic burglary and the prior conviction arose from a guilty plea. In that situation, there are no jury instructions, and it is not meaningful to ask whether "the jury necessarily had to find an entry of a building to convict." 495 U.S. at 602. The more appropriate question, as then-Chief Judge Breyer explained in United States v. Harris, 964 F.2d 1234, 1235 (1st Cir. 1992), is whether "the defendant and the government both believed that the generically violent crime ('building') rather than the generically non-violent crime ('vehicle') was at issue." To answer that question, it is reasonable and appropriate for the sentencing court to consult reliable documents in court files that indicate "the conduct in respect to which the defendant was charged and pled guilty." Ibid.[1]

[1] See United States v. Adams, 91 F.3d 114, 116 (11th Cir.) (per curiam) (allowing consideration of PSR), cert. denied, 519 U.S. 1047 (1996); cf. United States v. Hernandez, 218 F.3d 272, 279 (3d Cir. 2000) (allowing consideration of "easily produced court documents" to determine career offender status under Sentencing Guidelines § 4B1.1); United States v. Coleman, 158 F.3d 199, 202-203 (4th Cir. 1998) (en banc) (allowing consideration of "statement of charges" filed by complaining witness to determine whether conviction for assault is a "violent felony" under ACCA); United States v. Hill, 131 F.3d 1056, 1063 (D.C. Cir. 1997) (allowing consideration of "various court documents" to determine whether conviction is a "crime of violence" under Sentencing Guidelines § 2K1.1(a)(2)).

As the court of appeals held here, when the state charging papers merely track the statutory language, and no plea agreement or plea colloquy is available, the sentencing court may properly rely on certified copies of police reports and complaint applications that formed the basis for the charging documents and are contained in the state court files. See Pet. App. A6-A7, A26-A27. Reliance on those documents to determine whether the plea was to generic burglary is particularly appropriate in cases such as this one where the defendant has never contested the factual accuracy of the documents. See id. at A6-A7. Restricting the sentencing court's consideration to the charging documents, plea colloquies, and plea agreements would make application of the federal sentencing enhancement "hinge on the happenstance of state court record-keeping practices" and the vagaries of state prosecutors' charging practices. See id. at A27.

b. Petitioner errs in contending (Pet. 19-26) that the court of appeals' holding conflicts with Taylor. As discussed above, Taylor did not address how to determine whether a conviction based on a guilty plea under a statute that criminalizes both generic burglary and non-generic burglary was in fact for generic burglary. See Pet. App. A5. Nor did it explicitly rule out attention to documents in the court files besides the charging papers and jury instructions, particularly in the guilty plea context. See ibid.

Petitioner contends (Pet. 19) that the decision below conflicts with Taylor because "Taylor requires a determination of whether the factfinder necessarily found the defendant guilty of a crime which includes all the elements of generic burglary," while the decision below "requires a determination of whether, in the guilty plea, the parties both believed that generic burglary was at issue." See also Pet. 25-26. Contrary to petitioner's contention, that difference does not constitute a conflict between Taylor and the decision below. Rather, it reflects that Taylor addressed the situation in which a factfinder adjudicated the defendant's guilt, while this case addressed the different situation in which the defendant pleaded guilty.

Petitioner also mistakenly contends (Pet. 20) that Taylor "prohibits inquiry into the facts underlying the prior conviction," while the decision below requires such an inquiry. See also Pet. 22. What Taylor prohibits is an inquiry into the facts underlying a prior conviction for an offense that does not include the elements of generic burglary. When an offense does include generic burglary, but also includes non-generic burglary, Taylor permits examination of sources in the case record to determine the basis for the defendant's particular conviction. When a prior conviction rests on a jury verdict, Taylor allows consideration of the charging papers and jury instructions to determine whether "the jury necessarily had to find an entry of a building to convict." 495 U.S. at 602. In parallel fashion, when a prior conviction rests on a guilty plea, the decision below permits consideration of

reliable documents in the court files to determine whether the defendant and the prosecution alike understood the defendant to be pleading to conduct that constitutes generic burglary.

Consideration of the police reports and complaint applications from the court files of the prior convictions that are at issue here is consistent with Taylor's endorsement of consideration of the charging papers, because, in Massachusetts courts, "the 'complaint' is the final step in the charging process." Pet. App. A3 (citing 1 Mass. Crim. Practice §§ 4.1-4.2 (1998)). The complaint is issued based on a complaint application, which usually incorporates or is accompanied by a police report. Ibid. "The application is customarily sworn and is automatically given to defendants at their arraignments," so Massachusetts courts "can presume that defendants know the information contained in police reports." Ibid. (citing Commonwealth v. Brown, 748 N.E.2d 972, 981 (Mass. App. Ct. 2001)).

Although petitioner submitted an affidavit stating that the state courts did not "read" the police reports to him or ask him whether the information in them was true and that he did not admit their truth as part of his pleas, Pet. App. A4, petitioner has never suggested any conceivable factual basis for his guilty pleas other than the facts alleged in the reports. Petitioner's affidavit also must be considered in light of Massachusetts' Rules of Criminal Procedure, which require the judge to find a factual basis for a guilty plea before accepting it. See Mass. R. Crim. P. 12(c)(5)(A). In light of the presumption of regularity that

attends guilty plea proceedings, see Parke v. Raley, 506 U.S. 20, 29-30 (1992), federal courts can reasonably assume compliance with the factual basis requirement of petitioner's pleas. Absent some reason to believe that petitioner's crimes involved a boat or motor vehicle, there is a compelling inference that the state courts, in accepting petitioner's pleas, relied on the facts set forth in the police reports and complaint applications in the state court files.

Petitioner mistakenly contends (Pet. 20, 22-23) that the court of appeals required sentencing courts to hold evidentiary hearings to examine the facts underlying prior convictions. On the contrary, the court of appeals took pains to emphasize that its intention was to avoid "enmesh[ing] the district court in the kind of factually disputed 'archeological dig' about the defendant's conduct that Taylor guards against, with all the attendant practical difficulties of holding mini-trials on a defendant's prior convictions." Pet. App. A28. Petitioner is likewise mistaken when he suggests that the court of appeals has required "fact-intensive mini-trials" (Pet. 26). Reviews of certified documents contained in the court files for the prior state convictions are scarcely fact-intensive mini-trials.

2. Petitioner is also incorrect in asserting (Pet. 32-38) that the court of appeals' holding conflicts with decisions of other courts of appeals. None of the decisions cited by petitioner holds that a sentencing court may not consider police reports and complaint applications to determine whether a defendant pleaded guilty to "burglary" within the meaning of the ACCA. Thus, there

is no conflict between the decisions below and any of those decisions.[2]

In United States v. Howze, 343 F.3d 919, 921-924 (7th Cir. 2003) (cited at Pet. 33), the issue before the court was not what documents may be considered to determine whether a prior conviction counts as "burglary" under the ACCA. Rather, the issue was whether flight to avoid arrest and theft from a person are "violent felon[ies]" because they "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). United States v. Parker, 5 F.3d 1322, 1323-1324 (9th Cir. 1993) (cited at Pet. 33), also involved a different question than the one here. The question in that case was how to apply Taylor when the jury instructions have been lost or destroyed. The court had no occasion to address the Taylor requirements in the guilty plea context because Parker involved a prior conviction following a jury trial.

In United States v. Bentley, 29 F.3d 1073 (6th Cir.), cert. denied, 513 U.S. 1028 (1994) (discussed at Pet. 33-34), the court also did not address whether a sentencing court may consider police reports or complaint applications. Although the case involved a guilty plea, that question did not arise because the record of the defendant's prior conviction was limited to an indictment and a

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[2] Petitioner's contention (Pet. 26-32) that there are "two diametrically opposed lines of authority" within the First Circuit itself is not a basis for this Court's review. Any disagreement among the First Circuit's cases should be addressed by that court through en banc review. See Wisniewski v. United States, 353 U.S. 901 (1957) (per curiam).

judgment that did not necessarily describe a generic burglary. See id. at 1078.

United States v. Kirksey, 138 F.3d 120 (4th Cir.), cert. denied, 525 U.S. 849 (1998) (cited at Pet. 34), involved neither burglary convictions nor convictions based on guilty pleas. Nonetheless, to the extent it is relevant, Kirksey supports the decision in this case. In Kirksey, the court endorsed the sentencing court's consideration of complaining witnesses' statements as incorporated in the charging documents for the prior convictions. See id. at 125-126. Those statements are the functional equivalent of the police reports and complaint applications at issue in this case.

United States v. Richardson, 313 F.3d 121, 126-128 (3d Cir. 2002) (cited at Pet. 34, 35-36), also involved neither a prior conviction based on a guilty plea nor how to determine whether a prior conviction constitutes "burglary" under the ACCA. Rather, the question in Richardson was how to determine whether a juvenile adjudication qualifies as a "conviction" because it "include[d] a finding that [the defendant] ha[d] committed an act of juvenile delinquency involving a violent felony." 18 U.S.C. 924(e)(2)(C).

United States v. Allen, 282 F.3d 339 (5th Cir. 2002) (cited at Pet. 34, 35), also did not address what documents may be considered to determine whether a prior conviction constitutes "burglary" under the ACCA. Allen concerned whether a prior conviction was a "serious drug offense" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii). The offense of conviction, as defined by state law, met the ACCA's

definition of a "serious drug offense" when the conviction was entered, but state law had since been amended. See 282 F.3d at 341-343. The defendant contended that the conduct underlying the conviction would no longer be punishable under state law as an offense that meets the definition of a "serious drug offense," and he sought to rely on a police report to establish the conduct. See ibid. The court held that reliance on the police report would be inconsistent with Taylor, see id. at 343, a ruling that was correct under the circumstances. Allen did not involve the "narrow range of cases" in which Taylor permits a court "to go beyond the mere fact of conviction." Taylor, 495 U.S. at 602. Under Taylor, a court may look beyond the statute of conviction only where that statute criminalizes both conduct that constitutes a predicate offense under the ACCA and conduct that does not constitute a predicate offense. See id. at 599-602. Therefore, resort to any documents other than the statute of conviction was impermissible in Allen. Moreover, the court in Allen would have reached the same result whether or not it allowed consideration of the police report, because the qualification of a conviction as an ACCA predicate depends on the elements of the offense of conviction at the time of the conviction; whether an offense qualifies is not altered by subsequent changes in the law defining the offense.

United States v. Taylor, 932 F.2d 703 (8th Cir.), cert. denied, 502 U.S. 888 (1991) (cited at Pet. 34-35), was an appeal from the resentencing that followed this Court's decision in Taylor. The court of appeals affirmed the defendants' sentences

under the ACCA because the relevant indictments showed that their prior burglary convictions were based on statutes that criminalized only generic burglary. Id. at 707, 709. The court had no occasion to consider what documents may be considered when a defendant has pleaded guilty to an offense that criminalizes both generic and non-generic burglary.

In United States v. Sparks, 265 F.3d 825 (9th Cir. 2001) (cited at Pet. 35), the prior conviction resulted from a guilty plea to entry of storage lockers, and the court held that "a prior conviction for 'burglary' of storage lockers should not be counted as generic burglary unless the judicially noticeable facts reveal that the lockers were large enough to accommodate a person." Id. at 835. Although some language in the court's opinion suggests that the sources of "judicially noticeable facts" in guilty plea cases may be limited to "the indictment or information and the guilty plea," see ibid., the court was not presented with and consequently did not address the question whether police reports and complaint applications from the court files of the prior convictions may also be sources of "judicially noticeable facts."

Similarly, in United States v. Barney, 955 F.2d 635 (10th Cir. 1992) (cited at Pet. 35, 37), where the court vacated an ACCA sentence based on prior burglary convictions resulting from guilty pleas because the relevant indictments did not show that the convictions involved generic burglaries, the court was not asked to consider whether certified police reports and complaint applications from state court files may be used to determine the

nature of the prior convictions. In a later case, United States v. Haslip, 160 F.3d 649, 656-657 (10th Cir. 1998), cert. denied, 526 U.S. 1044 (1999), where the judgment for a prior conviction and the plea colloquy were not available, the court endorsed reliance on an authenticated copy of the complaint and a journal entry to determine that the defendant pleaded guilty to a generic burglary. That approach is consistent with the approach taken by the court of appeals in this case.

Although petitioner does not cite the case, in United States v. Payton, 918 F.2d 54 (8th Cir. 1990), the court of appeals reversed when the sentencing court relied on a police report to determine whether the defendant pleaded guilty to generic burglary. In Payton, the defendant had pleaded guilty to breaking and entering under a state law that covered generic and non-generic burglary. Id. at 55. Although the defendant's prior state conviction was based on a guilty plea rather than a jury verdict, the Eighth Circuit summarily concluded that "the district court erred in looking beyond the statute, the charging paper and the jury instruction." Id. at 56. Later Eighth Circuit cases, however, recognize that sentencing courts are not limited to that narrow range of documents where the prior convictions resulted from guilty pleas. For example, the Eighth Circuit has permitted reliance on the text of the guilty plea, see United States v. Demint, 74 F.3d 876, 877 (8th Cir.) cert. denied, 519 U.S. 951 (1996), and on the undisputed facts in the PSR, see United States v. Menteer, 350 F.3d 767 (8th Cir. 2003), pet. for cert. pending,

No. 03-8987 (filed Feb. 17, 2004). Menteer, in particular, suggests that the Eighth Circuit would reach the same result that the First Circuit reached here in a case, like this one, where the PSR recited the underlying facts supporting the prior conviction and the defendant never disputed those facts.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2004

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[3] Petitioner also does not cite United States v. Corona-Sanchez, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc), in which the court of appeals rejected reliance on the federal PSR unless it expressly references, as the source of its information, state court documents whose consideration the Ninth Circuit has approved, such the plea agreement, a transcript of the plea hearing, or the judgment of conviction. Corona-Sanchez does not conflict with the decision in this case, however, because the court there did not consider the appropriateness of relying on police reports and complaint applications that were filed in support of the state complaint and of which the defendant is presumed to have notice. Rather, Corona-Sanchez considered only the propriety of reliance on the federal PSR, which the court below made clear is not at issue in this case, see Pet. App. A6.

(2)

No. 03-9168

SUPREME COURT, U.S.
FILED
AUG 27 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

REGINALD SHEPARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX VOLUME I

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August 27, 2004

PETITION FOR CERTIORARI FILED FEBRUARY 23, 2004
CERTIORARI GRANTED JUNE 21, 2004

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UNITED STATES PROBATION OFFICE
BOSTON, MASSACHUSETTS

Case No. 1:98-cr-10262-NG

UNITED STATES,
Appellant,

v.

REGINALD SHEPARD,
Defendant-Appellee.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/12/1998	1	INDICTMENT returned Reginald Shepard (1) count(s) 1 . (sad) (Entered: 08/13/1998)
09/14/1998	8	Mag. Judge Zachary R. Karol . CLERK'S NOTES as to Reginald Shepard , re: arraignment held; defendants pleads not guilty to all counts, court sets schedule, issues standing order. , set Discovery Motions deadline to 10/6/98 for Reginald Shepard , Response to discovery motions due 10/20/98 motion Detention hearinf held: Govt enters exhibits 1-4 calls witness 1, direct cross, witness 2, agent Crowley, direct cross, Witness 3 direct cross, matter taken under advise,emt. ; Court Reportedr: Owens (jdj) (Entered: 09/24/1998)
09/15/1998	5	Mag. Judge Zachary R. Karol . ORDER entered for detention as to Reginald Shepard Bond set to NO BAIL for Reginald Shepard. (fmr) (Entered: 09/16/1998)

DATE	NO.	PROCEEDINGS
09/24/1998	9	Judge Nancy Gertner . ORDER entered as to Reginald Shepard :, set pretrial conference for 2:30 11/16/98 for Reginald Shepard , set Jury trial for 9:00 11/23/98 for Reginald Shepard , set Jury trial for 9:00 11/23/98 for Reginald Shepard . (fmr) (Entered: 09/24/1998)
03/03/1999	26	Judge Nancy Gertner . CLERK'S NOTES as to Reginald Shepard , re: change of plea; Plea of Guilty entered. Procedural order entered. Sentencing set for 5/27/99 at 3:00. Any memos to be filed on or before 5/21/99. Dft returned to custody of USMS ; Court Reporter: Hagopian (fmr) (Entered: 03/10/1999)
07/06/1999	30	Objection by Reginald Shepard as to Reginald Shepard to Governments objections to the presentence report , filed. (fmr) (Entered: 07/06/1999)
07/07/1999	31	Judge Nancy Gertner . CLERK'S NOTES as to Reginald Shepard , ;, reset Sentencing for 9:30 7/14/99 for Reginald Shepard Notes: Sentencing continued until 7/14/99 at 9:30 a.m. Court Reporter: Hagopian (ktb) (Entered: 07/08/1999)
07/14/1999	34	Judge Nancy Gertner . CLERK'S NOTES as to Reginald Shepard , re disposition. . Court Reporter: Hagopian (fmr) (Entered: 08/09/1999)

DATE	NO.	PROCEEDINGS
08/06/1999	35	Judge Nancy Gertner . JUDGMENT entered Reginald Shepard (1) count(s) 1. Defendant is sentenced to 46 months. Defendants is to participate in a 500 hour program. Supervised release of 36 months. Standard and special conditions apply. Special assess ment of 50.00 imposed. (fmr) (Entered: 08/09/1999)
09/03/1999	36	Sentencing...Transcript of proceedings held on 7/7/99 hearing date: before Judge: Gertner, as to Reginald Shepard , filed. (mcm) (Entered: 09/03/1999)
09/03/1999	37	Sentencing hrg ..... Transcript of proceedings held on 7/14/99 hearing date: before Judge: Gertner, as to Reginald Shepard , filed. (mcm) (Entered: 09/03/1999)
09/03/1999	38	NOTICE OF APPEAL by USA as to , filed. Reginald Shepard (1) count(s) 1 Appeal record due on 10/3/99 for Reginald Shepard (fmr) (Entered: 09/07/1999)
09/27/1999	40	SENTENCING MEMORANDUM as to Reginald Shepard , filed. (fmr) (Entered: 09/30/1999)
01/20/2000	43	AMENDED SENTENCING MEMORANDUM as to Reginald Shepard , filed. (fmr) (Entered: 01/21/2000)
01/09/2001	49	MANDATE OF U.S. Court of Appeals as to Reginald Shepard ; re: [38-1] appeal ; remanding for resentencing Reginald Shepard (1) count(s) 1 (jr) (Entered: 01/09/2001)

DATE	NO.	PROCEEDINGS
02/06/2001	53	Memorandum by Reginald Shepard Re: proceedings on remand (fmr) (Entered: 02/07/2001)
02/09/2001	55	Memorandum by USA as to Reginald Shepard Re: re sentencing procedure (fmr) (Entered: 02/12/2001)
03/12/2001	57	Memorandum by Reginald Shepard Re: re-sentencing procedure (fmr) (Entered: 03/13/2001)
03/23/2001	58	Memorandum by USA as to Reginald Shepard Re: apprendi v NJ (fmr) (Entered: 03/26/2001)
03/26/2001	59	Copy of NOTICE of filing of writ of cert , filed. (fmr) (Entered: 03/26/2001)
12/12/2001	61	SUPPLEMENTAL SENTENCING MEMORANDUM by Reginald Shepard, filed. c/s (Affidavit attached) (jf) (Entered: 12/12/2001)
12/13/2001	62	AFFIDAVIT of Reginald Shepard, , re: Resentencing Matters, filed in open court. (jf) (Entered: 12/14/2001)
12/13/2001	67	Judge Nancy Gertner. CLERK'S NOTES as to Reginald Shepard re: re-sentencing Government will file an opposition to defendant's sentencing memo 12/24/02, Reset Sentencing for 2:30 1/11/02 for Reginald Shepard ; Court Reporter: Hagopian (jf) (Entered: 01/11/2002)
12/13/2001	64	Memorandum by USA as to Reginald Shepard Re: after remand for re-sentencing procedure. c/s (jf) (Entered: 01/03/2002)

DATE	NO.	PROCEEDINGS
01/03/2002	65	RESPONSE by Reginald Shepard in opposition to [63-1] motion seeking permission to cite unpublished decision , filed c/s (jf) (Entered: 01/03/2002)
01/09/2002	66	Transcript of proceedings held on 12/13/01 hearing date: before Judge: Gertner, as to Reginald Shepard , Court Reporter: Harold M. Hagopian, filed (jf) (Entered: 01/09/2002)
01/11/2002	68	Judge Nancy Gertner . CLERK'S NOTES as to Reginald Shepard , re: re-sentencing; ; Court Reporter: Hagopian (jf) (Entered: 01/16/2002)
01/23/2002	69	Judge Nancy Gertner . AMENDED JUDGMENT ENTERED: Reginald Shepard (1) count(s) 1. Defendant is sentenced to 46 months. Defendant is to participate in a 500 hour program. Supervised release of 36 months. Standard and special conditions apply. Special assessment 0f 50.00 imposed. AMENDED JUDGMENT. The defendant pleaded guilty to count(s):1. It is ordered that the defendant shall pay a special assessment of $50.00 for count(s) 1 which shall be due immediately. It is further ordered that the defendant shall notify the US Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs and special assessment imposed by this judgment are fully paid. IMPRISONMENT – The defendant is hereby committed to the custody of the US Bureau of Prisons to be

DATE	NO.	PROCEEDINGS
		imprisoned for a term of 46 months on Count I. SUPERVISED RELEASE – Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. The defendant shall not possess a firearm as defined in 18 U.S.C. sec 921. Standard Conditions of Supervision apply. Special Conditions of Supervised Release – Defendant is prohibited from possessing a firearm or other dangerous weapon; defendant is to participate in a program for substance abuse as directed by the US Probation Office, which program may include testing to determine whether the defendant has reverted to the use of alcohol or drugs; defendant is to participate in a mental health program as directed by the US Probation Office; defendant is to participate in a Certified Batterer's Intervention Program, as directed by the Probation Office. . (jf) (Entered: 01/29/2002)
01/23/2002	70	Judge Nancy Gertner. Memorandum Re: Re-Sentencing entered. "…. On this record, given this case law, I cannot conclude by a fair preponderance of the evidence that Reginald Shepard has been convicted of "at least" three crimes of violence under the ACCA. Therefore, the original sentence I imposed on 7/14/99 (46 months on Count I), was re-imposed on 1/11/02, for the reasons stated above. So Ordered." Notice sent to counsel.[EOD Date 1/29/02] (jf) (Entered: 01/29/2002)

DATE	NO.	PROCEEDINGS
01/23/2002	71	Judge Nancy Gertner . Statement of reasons as to Reginald Shepard (jf) (Entered: 02/13/2002)
02/19/2002	72	NOTICE OF APPEAL by USA as to sentence imposed on 1/11/01, Memorandum Re: Re-sentencing 1/23/02 and Amended Judgment 1/29/02, filed. Reginald Shepard (1) count(s) 1 Appeal record due on 3/6/02 for Reginald Shepard. (jf) (Entered: 02/19/2002)
05/28/2002	73	Transcript of resentencing proceedings held on January 11, 2002 hearing date: before Judge: Gertner, as to Reginald Shepard , Court Reporter: Harold Hagopian, filed. (jf) (Entered: 05/29/2002)
11/03/2002	75	Request for Issuance of Arrest Warrant after Remand as to Reginald Shepard by USA. c/s(Filo, Jennifer) (Entered: 11/10/2003)
11/07/2003	74	JUDGMENT of USCA (certified copy) as to Reginald Shepard re 72 Notice of Appeal – Final Judgment; This cause came on the be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The sentence of the district court is vacated, and the matter is remanded for re-sentencing in conformity with the opinion issued this day. (Ramos, Jeanete) (Entered: 11/07/2003)

DATE	NO.	PROCEEDINGS
11/07/2003	76	OPPOSITION by Reginald Shepard re 75 Government's Request for Arrest Warrant after Remand, filed. c/s (Filo, Jennifer) (Entered: 11/13/2002)
01/08/2004	77	ORDER of USCA (certified copy) as to Reginald Shepard re 72 Notice of Appeal – Final Judgment; On motion of appellee Reginald Shepard for an order staying mandate, the issuance of the mandate is hereby stayed pending the filing of a timely petition for CERTIORARI and, if a timely petition for CERTIORARI is filed, pending a resolution of the petition by the Supreme Court. If the petition for CERTIORARI is denied, the mandate shall issue forthwith. If the petition is granted, the stay of mandate shall continue until disposition of the case by the Supreme Court. Counsel for appellee Shepard is directed promptly to notify the Clerk of this court both of the filing of any such petition for CETIORARI and its disposition. IT IS SO ORDERED. (Ramos, Jeanette) (Entered: 01/08/2004)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-2167

UNITED STATES,
Appellant,

v.

REGINALD SHEPARD,
Defendant-Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
10/21/99	CRIMINAL CASE docketed. Opening forms sent. Notice filed by Appellant US. Transcript Report/Order due 11/4/99. [99-2167] (eiln)
10/21/99	Transcript(s) filed by court reporter Harold M. Hagopian transcript # 39 court reporter Pamela R. Owens transcript # 10. [99-2167] (eiln)
10/21/99	TRANSCRIPT REPORT/ORDER filed by Appellee Reginald Shepard. Transcript has been ordered. Court Reporter has indicated the transcript will be ready by 10/21/99. [99-2167] (eiln)
5/12/00	CASE ARGUED 05/12/00. Torruella, Ch. J., Lipez, Keeton, JJ. (ceca)
11/13/00	OPINION issued. Torruella, Chief Judge, Lipez, Circuit Judge, and Keeton, District Court Judge of the the District of Massachuetts, sitting by designation. Signed Judge Kermit V. Lipez, Authoring Judge PUBLISHED [514069-1] [99-2167] (turn)

DATE	PROCEEDINGS
11/13/00	JUDGMENT entered closing case. The sentence of the of the district court is vacated and the matter remanded for further proceedings not inconsistent with the opinion filed this day. [514077-1] [99-2167] (turn)
11/27/00	PETITION filed by Appellee Reginald Shepard for panel rehearing. [525853-1] Certificate of Service dated 11/26/00. [99-2167] (eiln)
12/19/00	ORDER filed by Chief Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Michael Boudin, Judge Norman H. Stahl, Judge Sandra L. Lynch, Judge Kermit V. Lipez, Judge Robert E.Keeton. motion for rehearing addresses a jurisdictional issue raised by appellee on appeal but not addressed explicitly in the panel's decision. Petitioner stated that the relevant provision of the jurisdictional statute invoked by the government provides for appellate review of "an otherwise final sentence if the sentence . . . was imposed in violation of law." 18 U.S.C. 3742(b). The petition argued that the district court's ruling in this case was discretionary, and that the panel opinion thus does not correct a violation of law. This is not the case. As the panel opinion makes clear, the district court made a legal ruling. There was jurisdiction to hear the appeal under 3742(b). The petition for panel rehearing is denied. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges voting that the case not be heard en banc, it is ordered that the petition for rehearing en banc be denied.* (eiln)

DATE	PROCEEDINGS
1/9/01	MANDATE ISSUED. [99-2167] (laur)
1/9/01	RECORD returned to originating court. Vol-1 & Transcripts. (laur)
3/22/01	U.S. SUPREME COURT NOTICE filed regarding petition for writ of certiorari. Filed in the Supreme Court on [546221-1] 3/16/01. Supreme Court case number: 00-8998. [99-2167] (lina)
10/1/01	U.S. SUPREME COURT ORDER denying petition for writ of certiorari, filed in the Supreme Court on 10/01/01. [99-2167] (eiln)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 02-1216

UNITED STATES,

Appellant,

v.

REGINALD SHEPARD,

Defendant-Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
2/22/02	CRIMINAL CASE docketed. Opening forms sent. Notice filed by Appellant US. Appearance form due 3/8/02. Docketing Statement due 3/8/02. Transcript Report/Order due 3/8/02. [02-1216] (liona)
2/22/02	RECORD filed: 1 vol(s). Transcript(s) filed by Pamela Owens, Transcript No. 10 of Arraignment and Detention Hearing, September 14, 1998 and by Harold M. Hagopian. Transcript, No. 36, of Sentencing, July 7, 1999. Transcript, No. 37 of Sentencing, July 14, 1999. No. 39 of Sentencing, March 3, 1999. Transcript No. 66 of Resentencing, December 13, 2001. [636503-1] [02-1216] (lina)
11/3/03	OPINION filed. Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Kermit V. Lipez, Signed, Chief Judge Michael Boudin, Authoring Judge. PUBLISHED. [805555-1] [02-1216] (lina)

DATE	PROCEEDINGS
11/3/03	JUDGMENT entered Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Kermit V. Lipez. The sentence of the district court is vacated, and the matter is remanded for re-sentencing in conformity with the opinion issued this day. [805556-1] [02-1216] (lina)
11/17/03	PETITION filed by Appellee Reginald Shepard for panel rehearing and [809917-1] for rehearing en banc. [809917-2] [02-1216] Certificate of Service dated 11/17/03. [02-1216] (kris)
11/24/03	ORDER entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, Judge Jeffrey R. Howard. The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc, It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied. [02-1216] (lina)
12/1/03	(Faxed) MOTION filed by Appellee Reginald Shepard for stay of issuance of mandate pending filing of petition for certiorari. Certificate of service dated 12/1/03. [02-1216] (lina)
12/2/03	ELECTRONIC DOCUMENT, Motion of appellee to stay mandate, filed by Appellee Reginald Shepard. [02-1216] (lina)

DATE	PROCEEDINGS
12/31/03	ORDER entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, and Judge Kermit V. Lipez. On motion of appellee Reginald Shepard for an order staying mandate, the issuance of the mandate is hereby stayed pending the filing of a timely petition for certiorari and, if a timely petition certiorari is filed, pending a resolution of the petition the Supreme Court. If the petition for certiorari is denied, the mandate shall issue forthwith. If the petition is granted, the stay of mandate shall continue until disposition of the case by the Supreme Court. Counsel for appellee Shepard is directed promptly to notify the Clerk this court both of the filing of any such petition for certiorari and its disposition. It is so ordered. to stay mandate. [822622-1] [02-1216] (turn)
2/24/04	PUBLIC NOTE: Appellee Reginald Shepard's Notice of Filing of Petition for Certiorari filed by Attorney Linda J. Thompson in accordance with this Court's order of 12/31/03. [02-1216] (lina)
3/12/04	U.S. SUPREME COURT NOTICE filed regarding petition for writ of certiorari. Filed in the Supreme Court on [846798-1] 02/23/04. Supreme Court case number: 03-9168. [02-1216] (lina)
6/23/04	Appellee Reginald Shepard's notice of grant of Petition for Certiorari (on 6/21/04) filed. Certificate of service dated 6/22/04. [881164-1] [02-1216] (lina)
6/25/04	U.S. SUPREME COURT ORDER. The Court today entered the following order in the above-entitled case: The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certitorari are granted. [02-1216] (mlyn)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 98 CR 10262

UNITED STATES OF AMERICA

v.

REGINALD SHEPARD

---

18 U.S.C. § 922(g)(1)
(Felon in Possession of a Firearm)

INDICTMENT

COUNT ONE: 18 U.S.C. § 922(g) (1)—Felon in Possession of a Firearm

The Grand Jury charges that:

On or about Ocotber 17, 1995, at Boston, in the District of Massachusetts,

REGINALD SHEPARD,

the defendant herein, having previously been convicted of a crime punishable by a term of imprisonment exceeding one year, did knowingly possess, in and affecting commerce, a firearm and "ammunition, to wit: a Glock, model 17, 9 mm pistol, bearing the serial number DD567US; and 17 rounds of 9 mm ammunition bearing the head stamp "F C 9 MM LUGER"; and 13 rounds of 9 mm ammunition bearing the head stamp "E L D 9 mm" and 3 rounds of 9mm ammunition bearing the head stamp "R P 9 mm LUGER".

All in violation of Title 18, United States Code, Section 922(g)(1).

A TRUE BILL

/s/ [ILLEGIBLE]
FOREPERSON OF THE GRAND JURY

/s/ Nadine Pellegrini
NADINE PELEGRINI
Assistant United States Attorney

DISTRICT OF MASSACHUSETTS August 12, 1998, at 2:58 p.m.

Returned into the District Court by the Grand Jurors and filed.

/s/ [ILLEGIBLE]
Deputy Clerk.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 98-10262-NG

UNITED STATES OF AMERICA

vs.

REGINALD SHEPARD

Boston, Massachusetts
July 7, 1999

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE HON. NANCY GERTNER,
U.S. DISTRICT JUDGE

APPEARANCES:

For the Government: NADINE PELLEGRINI
Assistant United States Attorney
District of Massachusetts

For the Defendant: LINDA J. THOMPSON, ESQ.
Jacobson & Thompson, P.C.
1331 Main Street
Springfield, MA 01103

U.S. Court Reporter: HAROLD M. HAGOPIAN, RDR, CRR

Proceedings recorded by stenotype with
computer-aided transcription.

* * *

[3] THE COURT: * * *

Ms. Pellegrini, do you want to tell me what your recommendation is; but you can also make the argument about the violent felony issue, which is what I was struggling with for the past hour.

MS. PELLEGRINI: Certainly, your Honor. Actually, it is a little difficult to make a recommendation when there's such a disparity between what the guideline range is right now and what the guideline range would be.

THE COURT: Well, let's make sure we're on the same page. If I do not find armed career criminal status, then Mr. Shepard is in the 30 to 37 range, everyone agrees?

MS. PELLEGRINI: Yes, that's correct, according to [4] the PSI.

THE COURT: 30 to 37 months. And if I find career criminal, then Mr. Shepard is 15-year mandatory minimum, is it?

MS. PELLEGRINI: Yes, your Honor.

[9] And as I go through the documents and the particular crimes that we're talking about, I present to the Court those incidents and those findings from that which allow the Court to find that, in fact, these were crimes of violence as defined in that particular section, in 924(e)(2)(B).

For example, the first one we talk about actually comes from the PSR itself, and that indicates that, in fact, the defendant did break and enter the Crispus Attucks Children Center and removed property. But it also indicates [10] that the director of that center was in fear as a result of that break-in.

THE COURT: No, but that's what I wanted to separate out. Is it that you're saying the burglary of a dwelling is

sufficient to get you over the 924(e)(2) hump? Only the dwelling? You just have to show dwellingness?

MS. PELLEGRINI: Yes, but that—

THE COURT: Or do you have to show, in addition, dwelling plus someone put in fear?

MS. PELLEGRINI: No. Actually, I think that—the reason that I focused on that particular one was because it was a commercial structure; but that it presented a serious potential risk of physical injury to another by the fact that persons were present, and, therefore—

THE COURT: So, it's not dwelling. It's persons were present?

MS. PELLEGRINI: Persons were present. But given a dwelling, given the fact that a person more than likely would be present, I think that a dwelling normally would be considered a crime of violence because of that potential risk.

THE COURT: Now, under 4B1.2, under the guidelines for career offender, burglary of a dwelling under the commentary is a crime of violence. And the question is whether or not that applies—that analysis applies as [11] well.

And what you're saying here is that—I want to break this down as to what it is we're looking for and then what the data is that supports it. What we're looking for, as far as you're concerned, is burglary of a dwelling, period, because there's a risk that people will be in a dwelling, and, therefore, that violence will result.

And then you're saying go through the presentence reports—or, rather, go through the police reports or go through the indictment or go through the charging papers to see if we have a dwelling.

If you're saying no, or if the defendant is saying no, you have to show that somebody was actually put in fear, then

that's an enterprise that requires the same thing, to some degree. But it's less likely that in the charging papers you're going to find so-and-so was actually put in fear.

In other words, the indictment for burglary is more likely to include the site of it on the indictment, to which the defendant pleads guilty, than who was threatened.

And that involves more of the archeological dig that the Court in Dueno was talking about.

MS. PELLEGRINI: Your Honor, I hesitate to say that—I do believe that a breaking and entering into a dwelling would necessarily be a violent felony, as defined [12] under 924(e)(2)(B), because it requires not that someone actually be placed, but that it only requires a serious potential risk.

THE COURT: So, are you taking the position, then, that dwellings—that anyone who breaks—

MS. PELLEGRINI: Breaks into a dwelling—

THE COURT:—and enters involves—

MS. PELLEGRINI: Yes, presents a serious potential risk of injury.

THE COURT: And so you point to—you're still—in order to get—the charging papers in each of these convictions still use the generic language of the statute, and so you get to the dwelling part by looking at police reports; is that right?

MS. PELLEGRINI: In some cases they are police reports, in some cases they are the application for the complaint; but they are the documents that were in the district court's file, the court that actually took the plea.

THE COURT: The district court's file doesn't persuade me. There's all sorts of stuff in my file that are really nothing more than allegations that no one has litigated.

MS. PELLEGRINI: Well, I think what I'm getting at, your Honor, is if we're saying—okay, we have this [13] problem with generic language, because the title to this particular statute, 266, 18 or 16, throws in basically three or four different things—buildings, vessels, ships—maybe it's just the three. Then, if we have before us the information that, in fact, we have a street address and a cellar door was broken into it, we know we're not dealing with a vessel or a ship. We know we're not dealing with a vehicle—that's the other one—because a vehicle presents a problem, according to the Court of Appeals prior decisions when they were looking at whether or not a B and E would be a crime of violence.

But, since we have this information, we can exclude the nonviolent felony aspects of the B and E because we have this information.

So that these are, in fact, violent felonies. They should be considered as such. He has at least five. And he should be sentenced with those five violent felonies in his record, which makes him an armed career criminal.

THE COURT: If I don't go that way, would you move for an upward departure, because we're already at the top, but—

MS. PELLEGRINI: We're already at the top.

THE COURT:—there are ways of going beyond that on the ground that the criminal history understates his record?

[14] MS. PELLEGRINI: Your Honor, I have considered that and I've actually talked about that with the Probation Department regarding, you know, where our range would be. My concern is that, as a policy, I don't think that we—we as the United States Attorney's Office, want to see all B and E's sort of excluded from the consideration of whether or not they are a crime of violence because of what some perceive to be the language of Dueno, the prohibition of Dueno, when we don't see that as a prohibition at all.

THE COURT: What I see Dueno as doing, which is not inappropriate—just the general framework here, the government bears the burden of upward departures, of essentially upward departures. And here it has to be a burden that we'll take very seriously, because it's the different between, what is it, three years, or three or four years, and 15 years.

MS. PELLEGRINI: Fifteen.

THE COURT: So it's an enormous difference. And it seems to me that what Dueno reflects is a concern for relitigating in federal court crimes that—convictions that have taken place in state courts. Our trying to figure out exactly what someone was convicted of based on a record which has not been litigated by anyone. It was certainly not challenged by the defendant at the time when it would have been meaningful to challenge.

[15] And it sometimes involves reconstructing. And they talk about an archeological dig. We have to be concerned. You're reconstructing stuff from five, six, seven years ago. So it is a difficult process reconstructing information from five, six, seven years ago that is going to have a consequence on ten years of this man's life.

So, I think that the framework of Dueno is appropriate and serious. It also is concerned—goes along with the Supreme Court's decisions in *Taylor v. United States*, which talks about a categorical approach, and I think reflects this notion that where do I come off trying to figure out what was really going on in the state court based on inadequate, undocumented, unlitigated facts.

Nonetheless, the argument in this motion, or narrow argument that I understood from what I was reading, was that you're not saying—you're not looking at the putting in fear part. Does it matter that Mrs. Jones was put in fear, that I have to find that. You're saying that all I'd have to find

is that it's reasonable from this record that a dwelling was involved.

Now, is the U.S. Attorney's Office prepared to take the general position that whenever a dwelling is involved it is a crime of violence?

MS. PELLEGRINI: Yes, because that would present a [16] potential serious risk of physical injury to the inhabitants.

THE COURT: And that, therefore, on these facts, since the address is not—doesn't take—the address where this took place is virtually uncontested in these documents, and the address itself connotes a dwelling—

MS. PELLEGRINI: That's right.

THE COURT:—that I can go by that?

MS. PELLEGRINI: Because, your Honor, from what the Court just said, you know, trying to put together what happened, trying to piece together what happened, in these particular cases we're not dealing with a situation in each one of these convictions where Mr. Shepard was charged both with B and E and let's say an assault and battery or something else, and we can't tell what he pled to, and, therefore—but we have no idea.

In each of these cases, we no that there's a conviction, whether 266 either 16 or 18, of breaking and entering. The question is, is it breaking and entering a building? And then, what type of building? Or is it a vehicle, which causes a problem, or is it a ship or a vessel, which apparently also causes a problem?

What I'm saying is this information, obviously—there's no reason to believe that the conviction was anything else other than the breaking and entering of the [17] particular place in question. The Court did not accept a plea when the Crispus Attucks Center was broken into on that particular street to

breaking and entering of a vehicle or breaking and entering of a ship or a vessel.

And so, what I'm saying is there isn't much for the Court to do to determine that, because we have what was before the district court that took the plea.

THE COURT: Although this is exactly what was involved in Dueno.

MS. PELLEGRINI: But not necessarily, because what they're saying is—in Dueno they're saying we didn't—the record in those lacks even a single document that was before the judge that who accepted the plea. And they say that the account that they have from the PSR apparently took it's account from the police report, but it didn't have if police report.

THE COURT: But then the next sentence says "Dueno's sentence for this crime can reflect only those prior crimes of which he has been convicted either by a trier of fact or by his own admission."

So that is a substantial narrowing sentence, because then it says, "The colloquy has to comprise, for example, what we do in this Court," which is what are the facts that you're saying you did. And unless you can—unless you can take all of this together and tie it to [18] either what someone tried or his own admission, we can't rely on it.

And that, put in the context of the Taylor decision and of the other case, which is floating around here—is it Damon?

MS. PELLEGRINI: Damon.

THE COURT: United States versus Damon, which again talks about the troubling aspects of reconstructing state offenses.

I mean, do you agree with me that Dueno was exactly—if what you described is so easy to do, namely, where did this

crime take place, why is it so difficult for the First Circuit to do it in Dueno? They're making exactly the same decision that I am being charged with making.

MS. PELLEGRINI: I don't think so, your Honor, because I think that their record was less than what the Court has now.

THE COURT: Because you have given me a presentence report—I mean applications for complaints?

MS. PELLEGRINI: Because I have given you what—I know what the Court is saying about what a file is, but what the Court of Appeals was complaining about, not knowing what the District Court had in front of it, we now know that the district court had at least what's supposed to be in front of it.

[19] THE COURT: Right.

MS. PELLEGRINI: Whether or not the district court looked at it, obviously, we can't tell. But we now know that in fact Dueno was saying—I want to find this language.

They're saying the charging papers simply use the boilerplate, which is what we have here, and there are no jury instructions, all that we have here.

"We have found it appropriate"—and I'm sorry, this goes back to Stark II, unfortunately, in the early one.

THE COURT: No, I don't see anything—okay.

MS. PELLEGRINI: "Appropriate for the sentencing court to look at the conduct in effect for which the defendant was charged or pled guilty, because that conduct may indicate that the defendant and the government both believe that the generically violent crime rather than the generically nonviolent crime was at issue."

Well, I'm saying that based upon this record there is no way that a reasonable jurist would find that a generically nonviolent crime was at issue.

THE COURT: I mean, the general concern here is that things happen in state court that have no significance or limited significance at the time that they happened. And then we come here and we put enormous significance on them. So that nothing was litigated in the state court on these [20] issues, and yet now ten years hinge on what was not litigated.

I understand your argument. Thank you.

MS. PELLEGRINI: Thank you, your Honor.

THE COURT: Counsel?

MS. THOMPSON: Would you like for me to address the government's arguments, Judge?

THE COURT: Yes.

MS. THOMPSON: I have to say that I find Dueno slightly oblique in its approach. I also notice that it reversed Judge Gorton's determination to impose an enhanced sentence. And, in doing so, the Court says, "Although the issue is a close one, we do agree with Dueno that on the present record a reasonable jurist could conclude that there is insufficient reliable evidence."

Thus, a reasonable jurist, and I'm assuming that Judge Gorton is one, didn't conclude there was insufficient reliable evidence on the record that they had.

So, while they say that that's possible and reverse, the fact of the matter is that they are reversing a reasonable jurist who did make that conclusion. So I think that that suggests that this is not a conclusion to be drawn lightly.

One of the cases that was relied upon—that the defense has relied upon is the Martinez-Cortez case that [21] comes out of the Fifth Circuit. And it talked about the limitations that Taylor places upon the Court's ability to look or peek beneath the coverlet, or whatever.

That is not Taylor's language. Taylor looks at things that clearly are not specific to the facts of the case being tried, but are specific to the offense being tried, like jury instructions that are given. And that's specific to the offense that the jury returns a verdict on and not specific to the facts of that case, the jury being the fact-finder. But the jury instructions not being factually oriented.

I think that a look at the police report to determine whether it's a dwelling, whether it's a commercial building, whether it's a vehicle, whether it's a vessel is inappropriate under Taylor and under Martinez-Cortez.

And one of the things that has developed in this circuit, right up to Damon, is the use of a factual recitation in a PSR without objection.

And I want to make it clear to the Court that it was my intention to object both to the PSR being relied upon, any factual recitations beyond the face of a complaint, a charging document, and to the government's offering to the Court documents that are not the charging document itself, or the certified copy of the statute.

The way I see Taylor's requirement is that the [22] Court looks at the certified copy of the statute—in this case 266, 16 and 18—and a determination is made. It's a generic burglary, in the case of Taylor, described in the statute. If it is, inquiry ends. All right?

THE COURT: On page 602 of Taylor the Court says, "We think the only plausible interpretation of 924(e)(2)(B)(2) is that, like the rest of the enhancement statute, it generally requires the trial court look only to the fact of conviction"—that's easy—"and the statutory definition of the prior offense," which in this case doesn't get us very far—

MS. THOMPSON: It doesn't—

THE COURT:—"This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction"—and this is the language that I'm focusing on—"in a narrow range of cases where a jury was actually required to find all the elements of generic burglary."

And that's where the Dueno court got the language concerning jury instructions.

So that if this is the framework, I'd look only to the offense of conviction, or maybe a day will come when colloquies in the state court will be attached and we will have exactly what the person admitted to. And that's the other part of the language here—"The person has been [23] convicted by either a trier of fact or by his own admission."

But, absent that, I'm troubled to enhance ten years on this record.

[26] MS. PELLEGRINI: * * *

So, I do think that despite the very narrow language of Taylor that the First Circuit has had, there are situations, such as presented here, where we don't have jury instructions because we didn't have a jury trial, because we have a plea, where the Court may make this inquiry.

Further, the thing about the police report is—I know I keep harping on it, but when a Court says we don't even have it, and then when it goes on at a point, indicates that Damon's—excuse me, Dueno's assertion that the presentence report took its account from a police report that was not even part of the state court file.

To me, when you say those are negative things, if you present the positive, if you have something that is part of the state court file, and you have the police report, and then you have the report saying you're allowed to look at this information to make this determination, then we can look [27] at this and it becomes part of the Court's determination of what

happened in the state court. That sort of archeological dig is still permitted, and the First Circuit has never back-tracked from that.

THE COURT: Although, arguably, you can do that in a situation where the presentence report was not objected to.

In other words, you're not doing much of a dig. You're not—in fact, where the presentence report was not objected to, then you're doing what the last sentence of Dueno suggests, which is "a crime of which he has been convicted either by a trier of fact or by his own admission."

MS. PELLEGRINI: Uh-huh.

THE COURT: And there you have an admitted to characterization of the facts.

MS. PELLEGRINI: Is the Court saying, then, that the only way that we'd be able do this is we'd get a transcript of the plea colloquy?

THE COURT: I'm not sure.

MS. PELLEGRINI: I mean, what if the lower court's determination was how do you plead to 266, 16, and there is no further determination, because the state court's not looking at the same things we're looking at?

THE COURT: No, but I think that that's a [28] troubling issue. I mean, in other words, it's exactly what I said before, which is all sorts of things are being done in state Court that are not—that are done there because they have no significance to the outcome. Then people come over here and suddenly major significance attaches to facts that were not litigated in the state court. And that should give all of us pause. That just should give all of us pause. And I think that this line of cases reflects that.

Now, if we wind up doing this, in other words, taking this narrow view, then maybe it would put pressure on the state

court to be more precise about what it is sentencing and to have a colloquy and have maybe the docket reflect the defendant pled guilty to, and have the facts alleged in the docket, outlined in the docket.

I'm not sure. But the problem is that whatever the prior paragraph is that you read from, it says the sentence can reflect only those parts upon which he has been convicted either by a trier of fact or by his own admission. I don't see where I can go from there.

If you want an opportunity to reconsider the upward departure, I'll give you more time. We can then continue this until next week, and then that's it.

MS. PELLEGRINI: I do want an opportunity to do that, your Honor.

THE COURT: I appreciate the position you're in. [29] Mr. Shepard's record is about as bad as they come. This is, you know—escalating offenses, jail hasn't mattered, institutionalization hasn't mattered, and 30 to 37 months is a relatively modest amount for this kind of record. On the other hand, 15 years is extraordinary.

So, if you want to look at that again, I'll be happy to hear what you have to say and give you an opportunity to respond.

MS. PELLEGRINI: I would appreciate that time, your Honor.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 98-10262-NG

UNITED STATES OF AMERICA

vs.

REGINALD SHEPARD

Boston, Massachusetts
July 14, 1999

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE HON. NANCY GERTNER,
U.S. DISTRICT JUDGE

APPEARANCES:

For the Government: NADINE PELLEGRINI
Assistant United States Attorney
District of Massachusetts

For the Defendant: LINDA J. THOMPSON, ESQ.
Jacobson & Thompson, P.C.
1331 Main Street
Springfield, MA 01103

U.S. Court Reporter: HAROLD M. HAGOPIAN, RDR, CRR

Proceedings recorded by stenotype with
computer-aided transcription.

* * *

[7] Mr. Shepard has no prior involvement with firearms and no subsequent involvement with firearms. This was an offense—and I know that you are involved in a lot of cases, Judge. We came into court with—in the winter looking for discovery with regard to the cooperating individual in this case.

THE COURT: Right.

MS. THOMPSON: And the cooperating individual himself was no white knight.

THE COURT: What a surprise.

MS. THOMPSON: I was shocked myself. But this was a person who evidently was not even legally in the United States. He was involved with the ATF on loan, I understand, from the government's disclosures in this case. But he recruited Mr. Shepard to come in for this firearm offense as a way of working off his own obligation to the government. So, at least from my perspective, this becomes an offense that is sort of government-created. That is, this is not a case where the government, from anything I've been able to tell, was involved in an investigation of gun-running activities or illegal sale of firearms, or some other activity involving firearms, and came upon Mr. Shepard and investigated him and found that he was involved in that activity.

Rather, this was a case where the cooperating [8] witness needed to find somebody to get him some credit for his activities. He did find somebody. He found Mr. Shepard. Mr. Shepard has pled guilty to this offense. But there is no activity in his history that involves the use of firearms in any offense. And while his criminal history is extensive, for this kind of an offense and for no prior involvement with firearms whatsoever, I think that's fairly remarkable.

So, I think that it would be appropriate for the Court to look to the high end of the guidelines as calculated by the probation office. But at this point, when I look at how different the structure is for base offense levels in firearms and in other offenses that are covered by the sentencing guidelines, that Mr. Shepard has not fit into any of those—has not had his base offense level raised either by the specific characteristics of the offense, which would involve multiple firearms or use of a firearm. He is simply a prohibited person who has a firearm and who has an extensive criminal record.

And failing to either satisfy the provisions of 924(e) or the provisions of 2K2.1 to raise the base offense level in some way that would raise his guideline range, I think it's appropriate for the Court to stay within the guideline range as calculated by the probation office.

* * *

[22] So I decline to apply the armed career criminal enhancements. At that point I gave the government an opportunity to move for an upward departure, because I quite agree that this is an extraordinary record. And I do care about the fact that others with a category 6 record, all that you need is 13 or more points, and Mr. Shepard has 39 points, and that really suggests to me that if we stayed at a level 6, that like individuals would be treated in an unfair way; that is to say that they'd be alike in the sense that they were all a category 6, but that 6 would cover such a range of records.

The government has suggested in effect, though, [23] through an upward departure, that I de facto accomplish what the armed career criminal statute would have accomplished, which is a very substantial increase to—is it 110 months—110 to 137? Is that where you are?

MS. PELLEGRINI: Actually, it's 100 to 125, your Honor.

THE COURT: 100 to 125. That's ten years.

MS. PELLEGRINI: That's correct.

THE COURT: I just have to do the math. That's ten years. It seems to me—let me start off with sort of a forgotten document, which I actually read, and that is the statute that started all of this.

And the statute that started all of this, the guideline statute says that, "The Court shall impose a sentence sufficient but not greater than necessary to comply with the purposes set forth in paragraph two of this subsection, 3553(a)."

"Sufficient but not greater than necessary." I'm 19 supposed to do what I think is going to do the trick, and not anything more than that.

I look at Mr. Shepard's record, and I was just moved by Ms. Thompson's comments that this really is—this is a record —there are no guns in this record. There's no prior history of firearms in this record. This is an addict's record. I quite agree with what Ms. Thompson says.

[24] This is a stupid record.

THE DEFENDANT: Yes, your Honor.

THE COURT: This is a really stupid record. This is an addict's record of somebody who is literally hurtling from place to place, breaking into the first place he sees, breaking into—what was it, a child-care center at one point? I mean, it was a stupid record. There's no other way to describe this.

THE DEFENDANT: I agree, your Honor, exactly.

THE COURT: As a result of that—not venal. Not violent in the way some other records that I've seen are. Not assaultive behavior, although I guess there's some at moments. Just a plain old stupid record, and very much an addict's record.

* * *

[25] THE COURT: Okay.

I'm going to depart two levels upward to a level 4. I'm going to sentence you to 46 months in prison, with the strongest recommendation to the Bureau of Prisons that you be eligible for and participate in the intensive drug treatment program.

I also want you to write to me, Mr. Shepard. I want to hear what's going on. I want to understand whether or not the presentation you just gave to me is coming from the heart or something that needs to be said at sentencing. So I'd like you to write to me.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 98-10262-NG

UNITED STATES OF AMERICA

v.

REGINALD SHEPARD

Attorney: LINDA J. THOMPSON

JUDGMENT IN A CRIMINAL CASE

X The Defendant Pleaded guilty to count(s): 1

Accordingly, the defendant is adjudged guilty of such count(s),which involved the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Counts
18:922(g)	Felon in Possession of a Firearm	10/95	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall pay a special assessment of $50.00 for count(s) 1 which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address

until all fines, restitution, costs and special assessment imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 021-54-8744

Defendant's Date of Birth: 4/21/62

Defendant's Mailing Address: none

Defendant's Residence Address: Wyatt Detention Center
Central Falls, RI

Date of Imposition 7/14/99

/s/ _____
U.S. District Judge
Dated: 8/6/99

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 46 MONTHS ON COUNT 1.

X The Court makes the following recommendations to the Bureau of Prisons:

1. THAT THE DEFENDANT PARTICIPATE IN AN 500 HOUR COMPREHENSIVE DRUG TREATMENT PROGRAM.

X The defendant is remanded to the custody of the United States Marshal.

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on_____TO_____

AT_____with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

BY:_____

Deputy U. S. Marshal

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

SPECIAL CONDITIONS OF SUPERVISED RELEASE
(check all that apply)

X The defendant is prohibited from *possessing a firearm* or other dangerous weapon.

_ The defendant is to pay the balance of the *restitution* according to a court ordered repayment schedule.

_ The defendant is to pay the balance of the *fine* according to a court ordered repayment schedule.

_ The defendant is prohibited from *incurring new credit* charges or opening additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the payment schedule.

_ The defendant is to provide the probation officer access to any requested *financial information.*

_ The defendant is to serve __ months in *home detention,**(either)* with electronic monitoring and pay a fee of $4.97 for each day under electronic monitoring.

_ The defendant is to reside for a period of __ months in a *community corrections center* and shall observe the rules of that facility.

X The defendant is to participate in a program for *substance abuse* as directed by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to the use of alcohol or drugs.

X The defendant is to participate in a *mental health* program as directed by the United States Probation Office.

X The defendant is to participate in a *Certified Batterer's Intervention Program*, as directed by the Probation Office.

__ The defendant is to complete __ hours of community service at an agency approved by the probation officer.

__ The defendant is to meet with the Internal Revenue Service within the first __ days of the period of supervision in order to determine the prior tax liability and is to file tax returns and pay any future taxes due.

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the bureau of prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the Probation officer..

__ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (check if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (check if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the schedule of payments set forth in the criminal monetary penalties section of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set farther below) The defendant shall also comply with the additional conditions on the attached page (if indicated below)

X see special conditions page 3.01

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without permission of the court or probation officer;
2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without permission of the court;
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

STATEMENT OF REASONS

X The court adopts the factual findings and guideline Application in the presentence report.

OR

— The court adopts the factual findings and guideline application in the presentence report except: (see attachment if necessary): COURT DEPARTED UPWARD BASED ON ADEQUACY OF CRIMINAL RECORD. 4A1.3

Guideline Range Determined by the Court:

Total Offense Level:	12
Criminal History Category:	VI
Imprisonment Range:	30 to 37 MONTHS
Supervised Release:	2 to 3 YEARS
Fine Range:	$3.000, to $30.000.

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Total Amount of Restitution: N/A

N/A Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d)

N/A For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of title 18, restitution is

not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

N/A Partial restitution is ordered for the following reason(s):

— The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

— The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

X The sentence departs from the guideline range

— upon motion of the government, as a result of defendant's substantial assistance.

X for the following reason(s):

4A1.3 ADEQUACY OF CRIMINAL HISTORY CATEGORY.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Filed January 20, 2000]

Crim. No. 98-10262-NG

UNITED STATES OF AMERICA,

v.

REGINALD SHEPARD,
Defendant.

SENTENCING MEMORANDUM

January 20, 2000 Reginald Shepard ("Shepard") pleaded guilty to one count of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g). At the time of the offense, Shepard had a number of prior state criminal convictions for breaking and entering. The government argued that at least five of these convictions were "violent felonies" within the meaning of the Armed Career Criminal Act ("ACC") because they qualified as "burglaries" under 18 U.S.C. § 924(e)(2). See U.S.S.G. § 4B1.4. Shpard disagreed. The resolution of this dispute was critical: Shepard faced an increase in his sentence of approximately twelve years if I adopted the government's position.[1]

The substantive issue, whether Shepard's breaking and entering convictions constitute "burglaries," raised an even more fundamental one—how far may a court look beyond the language of the indictment to which the defendant pled guilty

[1] Under U.S.S.G. § 4B1.4, Shepard's sentencing range would increase considerably from 30-37 months to 188-235 months.

or of which he was convicted, to determine the character of a defendant's prior convictions.

The Sentencing Guidelines and the ACC attach substantial penalties not merely to the fact of a prior record, but to the nature of that record. Since these extraordinary consequences were never anticipated when the defendant pled guilty or was convicted in state court, they were never adjudicated by a court or jury, much less admitted to by the defendant. A sentencing court has two choices: On the one hand, she can look only to the formalities of the record—the language of the indictment to which the defendant pled, the meaning of the jury verdict as interpreted by the jury instructions—or the facts which the defendant admitted. On the other hand, she can try to evaluate the record post hoc, without the safeguards of a trial, to determine what the offense was "really" about—what the police report says, what the complaint application indicated.

Both the First Circuit and the Supreme Court have chosen the former. It plainly saves judicial resources. It avoids the legal equivalent of an archeological dig into past records. More importantly, it is by far the fairest approach. As a general matter, we, as a society, reject punishing someone based on facts that were never adjudicated, particularly where the defendant had no idea that the facts would have this added resonance. As I describe below, based on the formal record, I concluded that Shepard did not qualify as an Armed Career Criminal.

But concluding that Shepard did not qualify as an Armed Career Criminal did not mean that his substantial record would be ignored. The government also moved for an upward departure pursuant to U.S.S.G. § 4A1.3 (p.s.) based on the

seriousness of Shepard's criminal history.[2] Again, evaluating only the formal record of Shepard's convictions, I found that the number of convictions, their timing, and their nature, all suggest that Shepard's criminal history understated his culpability and the likelihood, of his recidivism. Accordingly, an upward departure was warranted.

Two hearings were held. The first, on July 7, 1999, focused on the ACC issue. The government asked the Court to accept facts taken from police reports and complaint applications as evidence to support its argument that at least five of Shepard's breaking and entering convictions were really burglaries (and thus "violent felonies") for purposes of the ACC enhancement. The second, on July 14, 1999, focused on the upward departure issue. The government urged the Court to consider the number, and "sheer industrious nature," of Shepard's prior convictions in enhancing his sentence. It then sought a sentence which, in effect, would have achieved the same result as an ACC finding.

In its objections to the pre-sentence report, Shepard opposed any factual recitations beyond the face of the complaints and specifically, any reference to police reports and complaint applications.

I departed upward by two levels. I sentenced Shepard to a term of imprisonment of forty-six months, followed by three years of supervised release. Furthermore, I ordered that Shepard participate in a 500 hour Comprehensive Drug Treatment Program, and attend a Batterer's Intervention Program.

[2] Indeed, the government did so at my invitation. After I indicated that I was not inclined to find Shepard an Armed Career Criminal, I invited the government to move for an upward departure, to be argued at a second sentencing hearing.

I. GUIDELINE CALCULATIONS

Base Offense Level:

The base level under U.S.S.G. § 2K2.1(a)(6)(A) is 14.[3]

Acceptance of Responsibility:

Due to Shepard's guilty plea, he is entitled to a 2 level reduction under U.S.S.G. § 3E1.1(a). Minus 2

Upward Departure:

As discussed below, I concluded that an upward departure of two levels to 14 was appropriate. Plus 2

Total Offense Level:

Shepard's total offense level of 14, and a criminal history category of VI, yields a sentencing range of 37-46 months. I sentenced him to the high end, at 46 months, and further, directed that he participate in a 500 hour Comprehensive Drug Treatment Program, and a Batterer's Intervention Program.

II. FACTS

A. Background

Shepard is a 37 year old man who has been involved with the criminal justice system for almost twenty years. As a young man, he witnessed his alcoholic father physically abuse his mother. Although his mother eventually kicked his father out when Shepard was 10 years old, she later became involved with another man who repeated the pattern, physically and emotionally abusing her, as well as Shepard and his sister. At age 16, Shepard finally moved out. He also

[3] U.S.S.G. § 2K2.1(a)(6)(A) provides that the base offense level will be 14 if the defendant is a "prohibited person." A "prohibited person" is defined to include anyone who, like Shepard, is under indictment for, or has been convicted of a "crime punishable by imprisonment for more than one year." U.S.S.G. § 2K2.1 (App. Nt. 6)

withdrew from school, got a job as a security guard, and significantly, began using drugs.

Shepard's history of abuse, and his continued use of cocaine and marijuana limited his capacity to keep a job, or to maintain positive relationships. In at least three of his relationships, drug use seemed to be what the couple shared most—in a rooming house in Mattapan, a rented apartment in Hyde Park, a Dorchester home. At the same time, perhaps the other side of drug filled days, at least four of the women obtained restraining orders against him.[4]

In 1988, Shepard tried to stop his drug habit by entering a rehabilitation program at Dimock Detoxification Center. After only six months of staying clean, however, he returned to drug use.

At sentencing, Shepard represented to the Court that he had voluntarily stopped using drugs since 1996. During part of that period, he was in the House of Correction. After his release in 1998, his girlfriend, Kathleen Cole, confirmed that he began attending Alcoholics Anonymous/Narcotics Anonymous ("A.A./N.A.") meetings. Shepard's family, who had largely rejected him because of his drug use, as I describe below, appeared in force at the sentencing hearing to buttress the claim that he had finally addressed his problem.

[4] One of these orders was related to incidents involving Kathleen Cole, Shepard's present girlfriend. In May 1998, Shepard was arrested for, among other things, assault and battery of Kathleen Cole. According to a police report, Ms. Cole reported various acts of physical abuse from a man currently living in her house. This report lead to Shepard's arrest, but these charges were eventually dropped. Ms. Cole states that Shepard was not the man in her report.

B. Criminal History

Since 1980, when he was 18 years old, Shepard has been on an 18-year crime spree.[5] But while lengthy, it is also the criminal history of a drug addict—a series of opportunistic, seemingly unplanned crimes, involving inappropriate targets with little chance of success. He is immediately apprehended; he pleads guilty and as soon as he is released, starts again.

1. The Breaking and Entering Convictions

Of particular importance to this case are Shepard's eleven convictions for breaking and entering,[6] at least five of which the government argues constitute burglaries. Probation and

[5] The longest continuous sentence Shepard received in the House of Correction was for two years in July 1991, for Breaking and Entering in the Daytime.

The convictions during this 18 year time period include charges filed on 5/23/80 (threatening); 11/4/80 (trespassing); 2/9/81 (breaking and entering and larceny); 7/20/81 (possession Class D); 11/15/84 (assault and battery on a police officer); 6/19/85 (operating to endanger and larceny of a motor vehicle); 3/8/87 (shoplifting and trespassing); 10/13/87 (automobile offenses); 5/27/88 (automobile offenses); 11/2/88 (shoplifting); 11/21/88 (shoplifting and trespassing); 12/7/88 (shoplifting and trespassing); 3/2/89 (shoplifting); 4/18/89 (breaking and entering); 5/9/89 (threatening and possession Class B); 5/18/89 (breaking and entering); 5/23/89 (breaking and entering); 7/12/89 (breaking and entering); 7/17/89 (trespassing); 7/27/89 (trespassing); 10/11/90 (breaking and entering and possession of burglarious tools); 3/11/91 (breaking and entering); 7/18/91 (breaking and entering); 1/25/93 (threatening, trespassing, and larceny); 7/9/93 (threatening and shoplifting); 2/4/94 (malicious destruction of property and breaking and entering); 5/23/94 (knowingly receiving stolen property and threatening); 11/9/95 (breaking and entering and larceny); 2/29/96 (breaking and entering and possession of burglarious tools); 5/4/98 (threatening and malicious destruction of property); and 5/12/98 (assault and battery).

[6] It is noted that one of these convictions—February 9, 1981—was not scored for purposes of the Criminal History computation under U.S.S.G. § 4A1.2(e) (out of applicable time period).

the defense disagreed, relying only on the language in the charging documents, the criminal complaints.[7] These complaints recite the boiler-plate language of the statutes, G.L. ch. 266 §§ 16, 18. And that language covers both breaking and entering into a commercial structure or dwelling, which is "generic burglary," as I describe below, and breaking and entering into a vehicle or vessel, which is not.[8]

In an effort to prove the actual conduct involved, in particular the location of the crime (i.e. in a structure or a vehicle), the government supplied additional materials, such as complaint applications and police reports. While the Probation Department described the content of these materials in its amended Pre-Sentence Report ("PSR"), it did not alter its conclusion. It continued to maintain that it was bound to rely only on the formalities of the charges.

In each case, Shepard pleaded guilty to the generally worded complaint. Nothing suggested that the facts alleged in

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[7] As these criminal cases were brought in Massachusetts District Court, Shepard was charged by Complaint, rather than by Indictment.

[8] The relevant statutes provide:

> Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished by imprisonment in the state prison for not more than twenty years, or in a jail or house of correction for not more than two and one-half years.

Mass. Gen. L. ch. 266 § 16 (1990). Statute was amended in September 1995 to include "or vehicle" language.

> Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years.

Mass. Gen. L. ch. 266 § 18 (1990). Statute was amended in November 1989, to include "or motor vehicle" language.

the complaint applications or the police reports were ever litigated, much less determined by a court or jury. At no point—then or now, during the various plea colloquies, or at this sentencing—did Shepard concede the facts on which the government now relies. Indeed, Shepard expressly contested any characterizations of these convictions that went beyond the words of the complaints.

a. April 18, 1989[9]

Shepard was sentenced to 18 months in the House of Correction, 6 months committed, and the balance suspended. The complaint stated that on April 2, 1989, the defendant "did break and enter in the daytime, the building, ship or vessel of Crispus Attucks Children's Center with the intent to commit a felony therein in violation of G.L. c. 266, § 18." The complaint application suggested that a building was involved, alleging that Shepard gained access to the Children's Center by breaking a window, and in so doing, he put the Director of the Center in fear.

b. May 23, 1989

The second conviction resulted in a 2 years suspended sentence and probation. On July 31, 1991, Shepard was found in violation of probation and committed to the House of Correction to serve his sentence. The complaint stated that on May 6, 1989, "the defendant did break and enter in the night time the building, ship, vessel, or vehicle, the property of Jerri Cothran, with intent to commit a felony therein, in violation of G.L. c. 266 § 16."

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[9] Although the government's brief states that this crime occurred on May 8, 1989, the facts described suggest that it intended to discuss the event which passed on April 2, 1989.

In discussing this offense, the government relies on the PSR, and does not supply any additional documentation.

The complaint application and the Boston Police report implied that a home was involved. They alleged that Shepard gained entry by breaking down a cellar door, and was then observed inside the pantry by the owner of the house.

c. March 29, 1991

For this conviction, Shepard was committed to the House of Correction for one year. The complaint stated that on March 11, 1991, "the defendant did break and enter in the night time, the building, ship, vessel or vehicle the property of Fretters, with intent to commit a felony therein in violation of G.L. ch. 266 § 16."

The Watertown Police report suggested that the site was a commercial building. The report stated that two managers of Fretters were in the stockroom when they observed the back door open and Shepard enter. According to both employees, the door was locked, and they believed that to enter, Shepard used a key that he did not return to the store following his termination from employment there several weeks before.

d. July 18, 1991

On this conviction Shepard was sentenced to two years in the House of Correction. The complaint stated that on July 18, 1991, "the defendant did break and enter in the day time the building, ship or vessel of Monica Collins with the intent to commit a felony therein, in violation of G.L. ch. 266 § 16."

The Boston Police report alleged that the officers responded to a radio call about a suspect in the hallway of a particular apartment building in Dorchester. Upon arrival, the officers observed Shepard walking away from the area carrying items from a particular apartment. Officers found that a panel on the third floor, front door had been broken, exposing the inside door lock.

e. February 4, 1994

The final conviction resulted in a two year sentence, six months committed and the balance suspended. The complaint set forth that on February 3, 1994, "the defendant did break and enter in the day time the building, ship or motor vehicle or vessel of Russell McGaugh with intent to commit a felony therein, in violation of G.L. ch 266 § 18."

The police report stated that Shepard was observed attempting to gain entry into the stated address by turning several doorknobs. A police officer went to the rear of the property and observed Shepard, with both hands through the glass partition, attempting to gain entry through another door. Upon seeing the police officer, Shepard fled, but was soon apprehended and placed under arrest.

2. The Remainder of Shepard's Record

Until the incident leading to the instant plea to Felon in Possession of a Firearm, Shepard was never charged with, or convicted of any crime involving the use or possession of a weapon. No weapon appears to have been involved in any of his prior offenses. Indeed, the vast majority of his offenses are within the jurisdiction of the state district court, for trespass, larceny, receiving stolen property, shoplifting, as well as breaking and entering.

C. This Incident

On October 17, 1995, an Alcohol, Tobacco and Firearms ("ATF") agent, acting in an undercover capacity, met Shepard regarding a prearranged deal to sell firearms. During the meeting, which was recorded on tape, Shepard completed a hand-to-hand sale of a Glock 17, 9 mm pistol for $ 600.00, and various rounds of ammunition for an additional $ 20.00. On March 3, 1999, Shepard entered a plea of guilty to one count of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g).

Defense counsel maintained that the deal was set up by an informant who needed to make deals to minimize his own sentence. Shepard, she suggested, because of his drug use, was vulnerable. It is clear that Shepard had not been targeted prior to this transaction. He simply fell into the net.

D. Other Facts

At the sentencing hearing, Shepard claimed that he had begun to "turn his life around." Influential in this change was a woman, Kathleen Cole, whom he met in 1996 while he was at Plymouth House of Correction. Cole is a certified Charge Nurse at Sunrise Care in Randolph, MA, and a certified physical trainer. During the period between March 1998 and September 1998 while he was out of jail, Shepard lived with Cole, managed to secure employment, attend A.A./N.A. programs and began counseling.[10] Since his detention at Wyatt on these charges, Cole moved to an apartment nearby. She visits him as often as is permitted and the couple writes to one another daily.

Finally, Shepard remarked on how his personal changes were also influenced by his rekindled relationship with his family, after many years of conflict because of his drug abuse. Indeed, he represented that in his lengthy criminal history not once had his family ever attended a court hearing. During the sentencing hearing on these charges, however, his Godmother, his sister, his niece, his sponsor at N.A., and his girlfriend were present.

III. LEGAL ANALYSIS

A. Armed Career Criminal

The government maintained that Shepard was subject to an enhanced sentence under the provisions of 18 U.S.C.

[10] He reported that instead of medicating himself with illegal drugs to deal with anger and depression, he took prescribed medications, which appear to be working.

§ 924(e). Specifically, it contended that Shepard qualified as an Armed Career Criminal pursuant to U.S.S.G. § 4B1.4(a). Under this provision, Shepard's base offense level would increase to 33, from 14. See U.S.S.G. § 4B1.4(b)(3)(B).

Pursuant to U.S.S.G. § 4B1.4 and 18 U.S.C. § 924(e), a defendant is determined to be an Armed Career Criminal if the following conditions exist: (1) the instant offense of conviction is a violation of 18 U.S.C. § 922(g), and (2) the defendant has at least three prior convictions for a "violent felony" or "serious drug offense" committed on occasions different from one another. See U.S.S.G. § 4B1.4 (App. Nts).

The term "violent felony," as set forth in 18 U.S.C. § 924(e)(2), provides:

> The term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use of, carrying of a firearm, knife or destructive device that would be punishable by imprisonment for such term if committed by an adult, that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise, involves conduct that presents a serious potential risk of physical injury to another.[11]

In *Taylor v. United States*, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990), the Supreme Court considered whether the defendant's predicate offenses qualified as "burglary" as defined in 18 U.S.C. § 924(e). Not content to rely on how each state might define "burglary," the Court defined generic "burglary" as the "unlawful and unprivileged entry into or remaining in, a building or structure, with intent

[11] The government relied only on the argument that Shepard's prior convictions constituted "burglaries" under 18 U.S.C. § 924(e)(12).

to commit a crime." See 495 U.S. at 599. In order to determine whether the defendant was convicted of such an offense, the Court held that a sentencing court should narrow its inquiry to the fact of conviction, and whether the statute of conviction included the generic elements, rather than examining the facts underlying the convictions. This, it dubbed, was the "categorical" approach (which I have described as focusing on the formalities of the record). See Taylor, 495 U.S. at 600; *United States v. Damon*, 127 F.3d 139, 141, 142 (1st Cir. 1997).[12]

To be sure, the Taylor court noted there was a problem when a single state statute swept beyond the elements of generic burglary, including within it breaking and entering in places other than buildings or structures (namely vehicles or vessels), and where the defendant's plea tracks the statute. See 495 U.S. at 599; *Damon*, 127 F.3d at 142. In such a case, while the sentencing judge may not hold a mini-trial on the particular facts underlying the prior offense, see *United States v. Dueno*, 171 F.3d 3, 4 (1st Cir. 1999) (citing *Damon*, 127 F.3d at 144; *Meader*, 118 F.3d at 882) he or she may "peek beneath the coverlet" of the formal language to ascertain whether the conviction was for a violent or a non-violent crime. See *Dueno*, 171 F.3d at 4 (citing *Winter*, 22 F.3d at 18). The question raised is how far that "peek" can go.

Not very far, is the answer; the exception to the categorical approach is a limited one. See *Taylor* 495 U.S. at 600-602; Damon, 127 F.3d at 142-46. The Court may consult "undisputed" and "accurate, judicially noticeable sources" for further guidance. See *Damon* 127 F.3d at 145, 147. If the defendant was convicted after a trial, the court is permitted to

[12] Following Taylor, the First Circuit's analysis of predicate offenses has generally utilized this "categorical" approach. See e.g., Damon, 127 F.3d at 142 (citing *United States v. Meader*, 118 F.3d 876, 881-83 (1st Cir. 1997); *United States v. Winter*, 22 F.3d 15, 18 (1st Cir. 1994); *United States v. De Jesus*, 984 F.2d 21, 23 (1st Cir. 1993)).

consider what the jury instructions suggested about the verdict. If the defendant pled, the court may consider what he admitted to at his plea. See Damon, 127 F.3d at 142; *United States v. Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992) (a court may consider the guilty plea when no jury instructions are available). Finally, if the relevant facts contained in the PSR are uncontested, the court may consider these as further admissions by the defendant. See *Dueno*, 171 F.3d at 7; Harris, 964 F.2d at 1236-37.

In this case, the breaking and entering statute under which Shepard pled guilty is the hybrid kind, covering conduct which constitutes "generic burglary," and conduct which does not.[13] See Taylor, 495 U.S. at 598; *Dueno*, 171 F.3d at 5 (refusing to find that all conduct described by Mass. Gen. L. ch. 266 § 16 is violent); cf. *Harris*, 964 F.2d at 1236 (assuming in dicta that breaking into and entering a vehicle is not a violent felony under the ACC). Each complaint does no more than mirror the statutory language. As a result, the government urges this Court to "peek" further to ascertain whether Shepard's crimes can be categorized as burglaries. The complaint applications and police reports, the government argued, suggested that the offenses involved breaking and entering into a "building" on all five occasions. Shepard objected, claiming that this was the very "archaeological dig" that the Supreme Court rejected.

I agreed with Shepard. Police reports and complaint applications do not meet the narrow exception to the categorical approach. They contain allegations that were never adjudicated before a judge or jury, never admitted by Shepard. In fact, there is no indication that the sentencing judge in the original case even had any of these documents available when he or she sentenced Shepard. See *Dueno*, 171

[13] For statutory language, see supra note 8.

F.3d at 6 (noting that the government provided no documents which had been before the judge when the plea was accepted).

No plea colloquies or plea agreements were offered to suggest that Shepard adopted one version of the facts rather than another for each of the convictions. Moreover, because Shepard objected to the factual representations in the PSR, the government cannot rely on the characterizations found therein. See *Harris*, 964 F.2d at 1236-37.

In fact, not only did Shepard not litigate these facts, he had no idea he had to do so. These facts—the location of the breaking and entering—were not necessary to his state plea. It is only now, years later, that they seem central because of a federal sentencing regime enacted years after Shepard pled.

Contrast Shepard's situation with that of a federal defendant pleading guilty today. Now, federal defendants who plead guilty make strategic decisions about which facts to contest and which to accept, carefully considering the impact their admissions will have on the ultimate sentence. The plea colloquy has assumed new significance, which it never had in the state court.

To attach such importance to facts neither litigated nor conceded violates the policies articulated by the Supreme Court in Taylor, and subsequent First Circuit precedent.[14]

[14] In Damon, the First Circuit articulated five important policy considerations supporting the categorical analysis. See 127 F.3d at 145-146. First, Congress intended the Guidelines themselves to take on a categorical approach to sentencing. Following such an approach leads to like cases receiving like sentences. *See id.* at 145. Second, using a categorical approach makes sense administratively as it only requires the court to look to readily available sources of undisputed information. Alternatively, a minitrial on the facts would impose "an onerous burden, freighted with unusual evidentiary difficulties," which are time consuming and could be unfair. *Id.* at 146 (citing Taylor). Third, the court found that the categorical approach honors the choice of the state in its decisions concerning which crimes to prosecute and how plea bargains should be negotiated. Fourth, the categorical approach is more or less evenhanded. On the one hand, in cases like this one, the approach may lead to lesser sentences than would result if the actual conduct could be considered. On the other hand, the approach may lead to higher sentences in other cases where a certain crime is categorically considered a "violent felony" even if the actual conduct exhibited no such violence. *See id.* Finally, the Court emphasized that this is a sentencing enhancement. The defendant has already been punished once for his earlier offenses. The fact that the Court is not permitted to consider the underlying conduct does not mean that the defendant somehow escapes punishment altogether. *See id.*

See *Taylor*, 495 U.S. at 600-602 (unfair to impose a sentencing enhancement based on the federal court, rather than the state court's review of the facts); *Dueno*, 171 F.3d at 6 (sentence defendant only for those specific "prior crimes of which he was convicted by a trier of fact or by his own admissions").[15]

[15] I have raised like concerns before, in *United States v. Footman*, 66 F. Supp. 2d 83, In Footman I addressed the language in the Guidelines which appeared to permit a court to look at prior criminal conduct in evaluating criminal history, and not merely prior criminal convictions. U.S.S.G. § 4A1.3(e) permits the court to consider "prior similar adult criminal conduct not resulting in a criminal conviction," so long as the information is "reliable." U.S.S.G. § 4A1.3 (Background). This section refers only to an upward departure because of the adequacy of criminal history, which is a discretionary judgment on the part of the judge. It does not refer to the Armed Career Criminal provisions of U.S.S.G. § 4B1.4 where the consequences of a finding of a prior violent felony are automatic and draconian. Second, in Footman, I added that just because a judge is permitted to consider this information does not mean he or she should do so:

> Once one ventures past formal convictions, and formal sentences, one is in troubling territory. How can the court reconstruct prosecutions long past? Should the court essentially retry the past conduct, or rely on police reports which may well be skewed? And if a matter has been dismissed, or worse, resulted in an acquittal, how can the court, many years hence, substitute its judgment for that of the original decision-maker?

Footman, supra 66 F. Supp. 2d at 100.

The government concedes that without the police reports or complaint applications it cannot determine the precise conduct to which Shepard actually pled guilty. Accordingly, I found insufficient evidence to conclude that Shepard's three of the five guilty pleas constituted crimes of generic burglary. See U.S.S.G. § 4B1.4; 18 U.S.C. § 924(e). As such, the Armed Career Criminal enhancement did not apply.

B. Inadequate Criminal History Category

The government argued that an upward departure is warranted and recommended a departure of twelve levels to an offense level of 24. Two questions were raised—the fact of an upward departure and the amount.

1. Whether an Upward Departure is Warranted

The Commission, pursuant to its authority under the Sentencing Reform Act, determined that a defendant's "past criminal conduct"[16] is directly relevant to the purposes of sentencing: An individual "with a record of criminal behavior" is more culipable than a first offender. Moreover, "General deterrence" requires that a message be sent that "repeated criminal behavior" will aggravate the punishment.[17] Finally, the commission suggests a criminal record is correlated with recidivism on the one hand, and the limited likelihood of rehabilitation on the other.[18]

U.S.S.G. § 4A1.1 attempts to identify the factors which correlate with these characteristics. For the most part, the criminal history score is keyed to the length of the sentence that the individual received in state court.[19] Presumably, the

[16] U.S.S.G. Ch. 4, Intro. Comment.

[17] *Id.*

[18] *Id.*

[19] In addition, the score is increased if the offense was committed while on supervision, or shortly after being released from prison. See U.S.S.G. § 4(A)1.1 (d)(e).

longer the sentence, the more serious the underlying conduct must have been. Category VI, however, is the highest category, reserved for anyone with a criminal history score of 13 or more.

There are serious limitations with the approach which the Guidelines recognize. Policy statement U.S.S.G. § 4A1.3 (p.s.) suggests that for an egregious criminal record, the top guideline range, Criminal History Category VI, may not always be adequate to reflect the seriousness of the defendant's criminal history. See U.S.S.G. § 4A1. 3 (p.s.) Moreover, because of the way convictions are scored, an individual with five prior sentences for very large scale fraud, may have the same number of criminal history points (because of the time he or she received for each), as another who had ten small offenses for which he or she received lesser sentences per case. The former would have a far more serious criminal record, warranting an upward departure. *See id.*

The government called for an upward departure on a number of grounds. It relied on the same argument as it did in insisting on ACC status, namely that some of Shepard's breaking and entering convictions in reality comprise burglaries which were "violent felonies." But as noted above, I did not make that finding.

Second, the government looks to the sheer number of convictions and the general nature of his criminal habits to support an increase.

The general methodology, which I outlined in *United States v. Footman, supra* (upward departure) on the one hand, and *United States v. Leviner*, 31 F. Supp. 2d 23 (D.Mass. 1999) (down ward departure) on the other, is as follows:

> . . . What is it about the [criminal history] score which created the under (or over) valuation of the record?: (i) prior sentences not counted in computing criminal

history (e.g., foreign sentences), (ii) prior sentences of "substantially more than one year" that derive from independent crimes on different occasions, see § 4A1.3(a) and (b); (iii) the timing of convictions—did they follow closely one after another, or while another charge was pending, see U.S.S.G. § 4A1.3 (d); and (iv) the nature of the convictions,—e.g., assaultive behavior or non-violent conduct.

Leviner, 31 F. Supp. 2d at 32-33.

Here, categories (iii) and (iv) as described in Leviner, are significant. Shepard's criminal history score is 39, three times the number triggering Category VI. Moreover, the timing of the convictions bespeaks someone who is out of control - committing one crime after another while on supervision, shortly after being released.

Shepard, however, emphasizes the nature of the convictions. He has never been charged with offenses that might have warranted a Superior Court indictment as opposed to a complaint in District Court. None of his prior offenses involved firearms; most are shoplifting, trespassing, motor vehicle infractions, receiving stolen property, breaking and entering.

But while the offenses did not involve firearms per se, and may not formally be "violent crimes" or "burglaries" under U.S.S.G. § 4B1.4, the record, however characterized, still suggests the likelihood of recidivism. One does not have to "peek beneath the coverlet" to conclude this.

2. Extent of Departure

a. Degree of Departure

In calculating the appropriate offense level when the Criminal History Category is already VI, the Guidelines instruct the Court to depart by moving incrementally down

the sentencing table to the next higher offense level until it finds the range appropriate for the case. See U.S.S.G. § 4A1.3 (p.s.).

In determining "appropriateness," I am guided by the statute creating the Federal Sentencing Guidelines, the Sentencing Reform Act. It directs me to impose a sentence "sufficient, but not greater than necessary, to comply with the purposes set forth. . ." 18 U.S.C. § 3553(a).

While Shepard's record suggests recidivism, it also suggests an out of control drug addict. Shepard gets out of jail, and returns to drugs, and the crimes he must commit in order to afford the drugs. Whatever sentence I impose must also include serious attention to Shepard's addiction. I have been told by the Probation Department that a sentence in the Guideline range of 30-37 months would not qualify Shepard for participation in the intense drug treatment program of the Bureau of Prisons.[20] Only a sentence at 46 months or more would suffice.

Shepard has never before served a federal sentence in a prison far from home. He has never served more than 2.5 years, and never in any institution other than the House of Correction. A departure to offense level 14, a Guideline range of 37-46, and a sentence at the high end, would be "sufficient," but not "greater than necessary" to meet all purposes of the Sentencing Reform Act.[21]

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[20] The Bureau of Prisons considers only the amount of time in its custody in calculating the prerequisites for the intensive drug treatment program. A guidelines sentence, minus the amount already served in pretrial detention, will not suffice.

[21] The purposes set forth in 18 U.S.C. § 3553(a)(2) are:

(A) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense;

(B) to afford adequate alternative to criminal conduct;

As such, I sentenced Shepard as follows:

I departed up two levels, to an offense level of 14. The Guideline range for this level at Criminal History Category VI is 37-46 months. I sentenced Shepard to 46 months in prison, with three years supervised release. In addition, I recommended that Shepard participated in the 500 hour Intensive Drug Treatment program in the Bureau of Prisons and directed him to send periodic reports to me of his progress.

SO ORDERED.

Dated: January 20, 2000

NANCY GERTNER, U.S.D.J.

(C) to protect the public from further crimes of the defendant, and;

(D) to provide the defendant with needed educational or vocational training, medical care or other corrective treatment in the most effective manner.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-2167

UNITED STATES,
Appellant,

v.

REGINALD SHEPARD,
Defendant, Appellee.

November 13, 2000, Decided

JUDGES: Before Torruella, *Chief Judge*, Lipez, *Circuit Judge* and Keeton,* *District Judge*.

OPINIONBY: LIPEZ

OPINION:

LIPEZ, Circuit Judge. This case requires us to decide the following question: may a sentencing court consider certified copies of police reports and complaint applications to determine whether a defendant pled guilty to three prior "violent felonies" qualifying for sentence enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). This question arises because the Massachusetts breaking and entering statute encompasses unlawful entries into buildings, vehicles, or vessels. For purposes of the ACCA, however, breaking and entering into a building qualifies as a violent felony, while breaking and entering into a vehicle or vessel does not.

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* Of the District of Massachusetts, sitting by designation.

On at least five prior occasions, Reginald Shepard had pled guilty to breaking and entering on the basis of a complaint that recited the boilerplate language of the statute. The government submitted police reports and complaint applications to the district court to show that Reginald Shepard had pled guilty to breaking and entering buildings on these five prior occasions. At sentencing, the district court concluded that the Supreme Court decision in *Taylor v. United States*, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990), and our own precedents applying Taylor, prohibited consideration of the complaint applications and police reports. In the view of the district court, such consideration would be inconsistent with the categorical approach to the analysis of predicate offenses announced in Taylor because police reports and complaint applications "contain allegations that were never adjudicated before a judge or jury, never admitted by Shepard." We disagree with the court's reading of Taylor and our precedents. We vacate the district court's ruling and remand for resentencing.

I.

On October 17, 1995, Reginald Shepard sold firearms to an undercover agent of the Bureau of Alcohol, Tobacco, and Firearms. During the taped meeting, Shepard sold a Glock 17, 9mm pistol for $ 600 and ammunition for $ 20.00. On March 3, 1999, Shepard entered a guilty plea to one count of felon in possession of a firearm, 18 U.S.C. § 922(g)(1). The ACCA mandates a fifteen-year minimum penalty for a person convicted as a felon in possession of a firearm pursuant to 18 U.S.C. § 922(g) who has three prior convictions for a violent felony or serious drug offense. See 18 U.S.C. § 924(e)(1). The government claimed that five of Shepard's eleven prior convictions were burglaries of buildings, a category of violent felony under the ACCA.

The complaints charging Shepard with breaking and entering recited the language of Chapter 266, sections 16 and 18, of the Massachusetts General Laws which define the offense to include unauthorized entry into vehicles or vessels, as well as buildings.[1] For example, a complaint from May 1989 states that Shepard "did break and enter in the night time the building, ship, vessel or vehicle, the property of Jerri Cothran, with intent to commit a felony therein."

In *Taylor v. United States*, 495 U.S. 575, 598, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990), the Supreme Court adopted a "generic" definition of burglary for purposes of ACCA enhancement that limits the crime to "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." To show that Shepard's breaking and entering convictions involved buildings rather than vehicles or vessels, the Government offered certified copies of complaint applications and police

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[1] Section 16 provides:

> Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished by imprisonment in the state prison for not more than twenty years or in a jail or house of correction for not more than two and one-half years.

MASS. GEN. LAWS ch. 266, § 16. Section 18 provides:

> Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years.

MASS. GEN. LAWS ch. 266, § 18.

reports obtained from the state court files.[2] These documents contain the following accounts of the five offenses at issue.

May 1989: The Boston police report states:

> Responded to R.C. [radio call] to 30 Harlem St. for B & E in progress. On arrival observed cellar door in rear had been broken down. Spoke to victim who [said] she heard noises downstairs. She then observed suspect described above in her pantry.

Consistent with the police report, the complaint application states that the defendant was charged with "breaking and entering night;" that the place of offense was "30 Harlem St.," and that the property stolen or destroyed was a "cellar door."

March 1991: The Watertown police report states:

> In reference to . . . a B&E&L from the FRETTERS store # 550 Arsenal Street Town reported on 3-11-91 the following is submitted:
>
> A follow-up investigation revealed that while the manager . . . and the assistant Manager . . . were in the back-room to the above buisness [sic] . . . they observed the back door open and observed a former employee, Reginal Shepard of # 9 Weaver Way Roxbury, enter the room. Upon seeing the two managers, the suspect Shepard ran from the room in a northerly direction out the parking lot toward arsenal street.

[2] By certifying a document, the signer attests that it has been accurately copied, not that the facts in it have been verified. The certifications of the police reports and complaint applications signed by the clerk or magistrate in this case state: "I hereby certify that this is a true copy, given under my hand and seal this 6 day of May 1999."

> NOTE* According to both employee's [sic] this door was locked and the only way in was with a key which they suspect Shepard had in his possession. . . .
>
> After this incident took place both [managers] did a quick inventory of the backroom area and found that (4) Emerson VCRs (20) 13" Hitachi T.V.s and (1) 19" Toshiba T.V. were missing.[3]

July 1991: The Boston police report states:

> Officers . . . responded to a radio call for an S/P wearing red shorts and blue shirt in the hallway of 258 Norwell St.
>
> Upon arrival observed S/P (described above) walking away from above address. S/P carrying a pink pillowcase. Officers detained S/P to conduct thresholdinq., found pillowcase to contain property listed above. . . . Officers checked bldg and found a panel on 3rd floor front door had been broken in exposing inside door lock. Officers entered apt. and observed, in living room, areas where V.C.R. and phone were taken from. Officers also observed in bedroom one pink pillowcase missing from pillow. Sheets and pillowcases in bedroom were all pink in color.

Consistent with the police report, the complaint application states that the defendant is charged with "b/e daytime," that the place of offense is "258 Norwell St." and that the property stolen or destroyed was a "V.C.R" and "phone/ans. machine."

February 1994: The Watertown police report states:

> Responded to a R/C [radio call] for a black male going door to door asking for an unk. person. . . . [Witness said suspect] went next door to # 145 Gallivan and was observed by the witness attempting to gain entry by

[3] The record does not include a complaint application.

> turning several door knobs . . . Officer . . . went to the rear of the property and suspect was observed with both arms through the glass partition (Glass to door was shattered) attempting to gain entry to the second door (near basement).

The complaint application states that the defendant was charged with "1. breaking & entering 2. wilful malicious destruction of personal property," that the place of offense was "145 Gallivan Blvd.," and that the property stolen or destroyed was a "rear door."

April 1989: According to the district court:[4]

> The complaint application suggested that a building was involved, alleging that Shepard gained access to the Children's Center by breaking a window, and in so doing, he put the Director of the Center in fear.

The Probation Department included in the Pre-Sentence Report (PSR) descriptions of the police reports and complaint applications. The department concluded, however, that the court could not sentence Shepard as an armed career criminal because it could not use those documents to determine whether Shepard had pled guilty to a violent felony. Shepard agreed with the department's conclusion, but he objected to the inclusion in the PSR of factual allegations other than those set forth in the complaints to which he had pled guilty in state court. The government also filed an objection with the court challenging the Probation Department's failure to apply the ACCA enhancement.

At the conclusion of a two-part sentencing hearing, the court rejected the government's request for an enhancement

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[4] We quote from the district court's rendering of the complaint application because we do not have the application in the record before us. The district court notes that the government did "not provide any additional documentation."

under the ACCA, which would have placed Shepard's sentencing range at 188-235 months. Instead, the court sentenced Shepard pursuant to the "prohibited person" provision, HN4 U.S.S.G. § 2K2.1(a)(6)(A), which prescribes a base offense level of 14 for a person who receives, possesses, or transports a firearm and has a prior conviction for a "crime punishable by imprisonment for more than one year," U.S.S.G. § 2K2.1, comment. (n.5). The court also granted the government's motion for an upward departure pursuant to U.S.S.G. § 4A1.3 due to the seriousness of Shepard's criminal history and increased his sentencing range from 30-37 months to 37-46 months. We quote at length the district court's lucid rationale for its decision:

> Police reports and complaint applications do not meet the narrow exception to the categorical approach. They contain allegations that were never adjudicated before a judge or jury, never admitted by Shepard. In fact, there is no indication that the sentencing judge in the original case even had any of these documents available when he or she sentenced Shepard. *See [United States v.] Dueno*, 171 F.3d [3] at 6 (noting the government provided no documents which had been before the judge when the plea was accepted).
>
> No plea colloquies or plea agreements were offered to suggest that Shepard adopted one version of the facts rather than another for each of the convictions. Moreover, because Shepard objected to the factual representations in the PSR, the government cannot rely on the characterizations found within. *See [United States v.] Harris*, 964 F.2d [1234] at 1236-37.
>
> In fact, not only did Shepard not litigate these facts, he had no idea he had to do so. These facts—the location of the breaking and entering—were not necessary to his state plea. It is only now, years later, that they seem

central because of a federal sentencing regime enacted years after Shepard pled.

Contrast Shepard's situation with that of a federal defendant pleading guilty today. Now, federal defendants who plead guilty make strategic decisions about which facts to contest and which to accept, carefully considering the impact their admissions will have on the ultimate sentence. The plea colloquy has assumed new significance, which it never had in state court.

To attach such importance to facts neither litigated nor conceded violates the policies articulated by the Supreme Court in Taylor, and subsequent First Circuit precedent. *See Taylor*, 495 U.S. at 600-602 (unfair to impose a sentencing enhancement based on the federal court, rather than the state court's review of the facts); Dueno, 171 F.3d at 6 (sentence defendant only for those specific "prior crimes of which he was convicted by a trier of fact or by his own admission").

The government brought this appeal, arguing that the district court erred by refusing to consider the police reports and complaint applications and by not sentencing Shepard as an armed career criminal. The question of "whether a conviction for a particular type of crime qualifies as a predicate offense [under the Armed Career Criminals Act] presents a purely legal question, sparking de novo review." *United States v. Winter*, 22 F.3d 15, 18 (1st Cir. 1994).

II.

A. The Taylor Categorical Approach

The Armed Career Criminals Act provides that a person who violates the felon in possession of a firearm provision (§ 922(g)) and has three prior convictions "for a violent felony or serious drug offense, or both, committed on occasions different from one another" will receive a fifteen-

year minimum sentence.[5] 18 U.S.C. § 924(e)(1). The statute defines a violent felony as:

> Any crime punishable by imprisonment for a term exceeding one year . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

18 U.S.C. § 924(e)(2)(B).

In *Taylor v. United States*, 495 U.S. at 596-600, the Supreme Court considered whether the defendant's prior burglary convictions qualified for enhancement under § 924 (e) despite the defendant's contention that the convictions did not involve conduct that presented a serious potential risk of physical injury to another. The United States Court of Appeals for the Eighth Circuit had rejected Taylor's argument, ruling that the word burglary in § 924(e)(2) (B)(ii) "means 'burglary' however a state chooses to define it." *United States v. Taylor*, 864 F.2d 625, 627 (1989). The Supreme Court disagreed, concluding that predicate offenses under the ACCA are "crimes having certain common characteristics—the use or threatened use of force, or the risk that force would be used—regardless of how they were labeled by state law." Taylor, 495 U.S. at 589. The Court called this focus on crimes having certain specified elements or common characteristics a "categorical approach," which the Court attributed to Congress. In order to implement the

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[5] When the ACCA applies, the Guidelines address whether, based on the defendant's criminal history and offense level, the fifteen-year minimum or a greater sentence is warranted. U.S.S.G. § 4B1.4 specifies how the court should calculate the defendant's criminal history and base offense level so that it can use the sentencing grid to determine the length of imprisonment beyond the statutory minimum.

categorical approach in Taylor, the Court concluded that Congress "had in mind a modern 'generic' view of burglary, roughly corresponding to the definitions of burglary in a majority of the States' criminal codes." *Id.* The court found that definition to be the following: "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598.

Having settled upon the generic definition of burglary intended by Congress in the ACCA, the Court turned to a second question in Taylor: "whether, in the case of a defendant who has been convicted under a nongeneric-burglary statute [e.g. one that includes places, such as automobiles and vending machines, other than buildings], the Government may seek enhancement on the ground that he actually committed a generic burglary." *Id.* at 599-600. In addressing that question, the Court again invoked the categorical approach intended by Congress. It noted that "the practical difficulties and potential unfairness of a factual approach are daunting," *id.* at 601, and concluded that the categorical approach to the nongeneric burglary statute "requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602.

Then the Court immediately offered a qualification to the rule it had just announced:

> This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary. For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government

> should be allowed to use the conviction for enhancement.

Id. This qualification permits a court to consider the charging document and jury instructions and to conclude that the fact of conviction necessarily means conviction of the generic crime of burglary included in the ACCA.[6]

In Taylor, however, the Court did not address the extent to which a sentencing court can go beyond the fact of conviction, for the purpose of determining an ACCA enhancement, when a defendant has pled guilty to a charge based on a statute that includes both violent and non-violent offenses within the meaning of the ACCA. That is the issue we have addressed in our precedents,[7] and to which we now turn.

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[6] In addition to specific crimes such as burglary, arson, and extortion, the Armed Career Criminal Act defines as a "violent felony" a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). We have regarded the Taylor categorical approach for burglary as applying to other kinds of felonies that may qualify as violent under the "otherwise" clause. *See United States v. Sacko*, 178 F.3d 1, 7 (1st Cir. 1999).

[7] To be precise, our precedents address this issue in the context of both the Guidelines' career offender enhancement for crimes of violence and the Armed Career Criminal Act's enhancement for violent felonies. The career offender enhancement applies if the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." *See* U.S.S.G. § 4B1.1. The commentary to U.S.S.G § 4B1.4 states: "It is to be noted that the definitions of 'violent felony' and 'serious drug offense' in 18 U.S.C. § 924(e)(2) are not identical to the definitions of "crime of violence" and "controlled substance offense" used in § 4B1.1 (Career Offender) . . . ." U.S.S.G § 4B1.4, cmt.n.1. Despite the differences between § 4B1.1 and § 924(e)(2), the categorical approach applies to both provisions and we may look to the § 4B1.1 cases to elucidate the nature of the categorical inquiry. *See, e.g., United States v. Meader*, 118 F.3d 876, 882 (1st Cir. 1997) (although Taylor's narrow exception may apply to cases that come under the "otherwise" clause of § 4B1.2, "the standard approach for determining whether a particular crime fits within the 'crime

B. The Categorical Approach and the Guilty Plea

Not surprisingly, our precedents separate into two strands that reflect the two distinct questions addressed by the Supreme Court in Taylor. We will discuss them accordingly.

1. Whether the Applicable State Statute Defines a Violent Felony or a Crime of Violence

As we noted, the Taylor Court first decided what common elements of burglary would make it a violent felony under the ACCA. In *United States v. Damon*, 127 F.3d 139 (1st Cir. 1997) and in *United States v. Sacko*, 178 F.3d 1 (1st Cir. 1999), the comparable question was whether the statutory offenses at issue in those cases constituted a crime of violence within the meaning of the Guidelines (Damon) or a violent felony within the meaning of the ACCA (Sacko). This was a general definitional question that did not depend on documents specific to that case.

In Damon, we considered the district court's use of a PSR to determine whether a Maine conviction for aggravated criminal mischief constituted a "crime of violence." The charging document indicated that Damon was convicted under subsection B of the statute, which applies to a person who intentionally or knowingly damages or destroys property valued at over $ 2,000 in order to collect insurance proceeds. *See Damon*, 127 F.3d at 142-43. Thus, "the inquiry is whether the elements of subsection B fit the definition of a crime of violence under U.S.S.G. § 4B1.2(1)(ii)." *Id.* at 143. We looked to the "mine run of conduct" that the statute was intended to cover and concluded that "the typical conduct reachable under subsection B does not involve a serious

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of violence' rubric is a generic one, in which inquiry is restricted to the statutory definitions of the prior offense, without regard to the particular facts underlying them"); *United States v. Winter*, 22 F.3d 15, 18 (1st Cir. 1994)("Determining whether a previous conviction represents a crime of violence necessitates a formal categorical approach.").

potential risk of physical injury to another." *Id.* at 143-44. We concluded that the district court erred by considering the fact that the defendant set fire to his house to collect insurance proceeds because "under Taylor, when the predicate statutory crime has been determined to be typically non-violent, the inquiry ends." *Id.* at 145.

In Sacko, we concluded that the district court erred by considering the statement in the PSR that the defendant's prior statutory rape conviction involved non-consensual intercourse. That consideration involved the very reliance proscribed by Taylor—reliance on "the facts of Sacko's crime in order to determine whether his conviction was for a violent or a non-violent crime," Sacko, 178 F.3d at 5. We held that under the categorical approach, the proper inquiry was whether the category of the offense, statutory rape of a fourteen year-old, constituted a violent felony. We noted that there was "no legal basis . . . no studies or medical journals" to ground a holding that intercourse with an adult is physically dangerous for a fourteen-year-old female. *Id.* at 6. We remanded the case to the district court to take evidence on this issue.

Both Damon and Sacko posed the definitional question whether the statutory offenses at issue constituted a crime of violence under the career offender guideline (Damon) or a violent felony within the meaning of the ACCA (Sacko).[8]

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[8] Our circuit addressed related definitional questions in two other cases, *United States v. Winter*, 22 F.3d 15 (1st Cir. 1994) and *United States v. Meade*, 175 F.3d 215 (1st Cir. 1999).

In Winter, the issue before the court was whether racketeering, conspiracy to commit racketeering, travel in aid of racketeering, and sports bribery qualified as predicate crimes of violence under the career offender guideline. Because physical force is not an element of any of these offenses, we asked whether, from a categorical standpoint, any of them could be said to pose "serious risk of physical injury," as the guideline required. Following Taylor, we cautioned that "the court should

There was no uncertainty about whether a violent or non-violent offense encompassed within a statute was involved in the fact of conviction. As we noted in Damon, such cases do not "raise the question of what documents beyond the charging document or the jury instructions may be examined to determine which subsection of the multi-faceted crime is involved. The question about what subsection or type of statutory crime is involved is resolved here by the charging document." 127 F.3d at 144 n.5.

2. Whether the Fact of Conviction was for a Violent or Non-Violent Felony When the Applicable State Statute Encompasses Both

The second question addressed in Taylor was whether a conviction under a nongeneric burglary statute, which included violent and nonviolent offenses, could be a conviction for a predicate offense under the ACCA. In *United States v. Harris*, 964 F.2d 1234 (1st Cir. 1992) and *United States v. Dueno*, 171 F.3d 3 (1st Cir. 1999), we addressed a comparable question. There was no definitional uncertainty in those cases about whether a statutory offense constituted a violent crime. Instead, the uncertainty was whether the fact of conviction related to a violent crime or a nonviolent crime. As we recognized, that uncertainty could only be resolved by considering case specific documents.

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not plunge into the details of a particular defendant's conduct," but, rather, "should merely assess the nature and object of the racketeering activity as described in the indictment and fleshed out in the jury instructions." Winter, 22 F.3d at 19.

Meade involved the question of whether the defendant's misdemeanor conviction for spousal assault, under a general assault and battery statute, qualified as a misdemeanor crime of domestic violence. The court construed the underlying statute to determine that the conviction did so qualify, rejecting the defendant's argument that Taylor's categorical approach should extend so far as to prevent courts from establishing the elements of the statute of conviction. *See Meade*, 175 F.3d at 221.

In Harris, the defendant pled guilty to a Massachusetts assault and battery statute which covered both actual or potential physical harm and unharmful but nonconsensual touching. We acknowledged the general rule under Taylor that when the statute encompasses violent and non-violent conduct, the sentencing court should look to the indictment and information or jury instructions to make the violent felony determination. However, we recognized that Harris's case posed a further question: "What . . . should a court do when there are no jury instructions to look at . . . because the defendant pled guilty?" Harris, 964 F.2d at 1235. In answer to that question, we said the sentencing court should:

> look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested . . . in the violent or non-violent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime . . . rather than the generically non-violent crime . . . was at issue.

Id. at 1236.

We concluded in Harris that "the record before us provides adequate information to make the required determination relatively simply." *Id.* In particular, we considered a PSR which recited facts from the case file revealing that both of the defendant's assault and battery convictions involved violent beatings. *Id.* at 1236-37. We found the PSR to be a reliable source for establishing whether the defendant pled guilty to a violent crime because the basic facts alleged in the PSR—i.e., that the defendant perpetrated a violent assault—were "uncontested and uncontradicted." *Id.* at 1237. Given the PSR's uncontradicted account of the defendant's conduct, we concluded "that the defendant and the government both believed" that a generically violent crime was the basis for the defendant's guilty pleas. *Id.* at 1236.

In *United States v. Dueno*, 171 F.3d 3, 6-7 (1st Cir. 1999), despite strong urging from the defendant, we refused to retreat from Harris's limited inquiry into conduct "in respect to which the defendant was charged and pled guilty." Dueno, 171 F.3d at 5 (analyzing the Guidelines' career offender enhancement). As here, Dueno involved a predicate Massachusetts breaking and entering conviction memorialized by a judgment which was ambiguous as to whether the defendant broke into or entered a building or a vehicle. *See id.* at 5. On appeal, the government conceded that the district court had engaged in erroneous reasoning in concluding that the conviction was for breaking into and entering a building,[9] but urged us to sustain the enhancement on the ground that Dueno never contradicted the PSR's account of the break-in, which described a building invasion. *See id.* at 6. Although we regarded the issue as "close," we declined to affirm on the government's alternative ground and instead remanded. *Id.* at 7. Applying Harris, we concluded that "on the present record, a reasonable jurist could conclude that there is insufficiently reliable evidence to ground a finding that Dueno pleaded guilty to breaking into and entering a building." *Id.* at 7. Specifically, we noted several problems with the evidence presented to the sentencing court. First, instead of offering the police report from which the facts were taken, the government offered only the PSR which incorporated facts from the police report. Second, the evidence did not include "a single document that was before the judge who accepted

[9] The court had accepted the government's argument that a second charge in the complaint for destruction of property, which alleged harm to "the personal property, dwelling, house or building of [the victim]," established that Dueno broke into and entered a building, and thus committed a crime of violence. On appeal, the government conceded that this description could refer to unlawful entry and vandalism of a vehicle as much as to destruction of property related to breaking and entering into a building. *See Dueno*, 171 F.3d at 5-6.

Dueno's plea." *Id.* at 7. Third, there was no account of what took place at Dueno's plea hearing.

At the conclusion of Dueno, we said the following:

> Dueno's sentence for this crime can reflect only those prior crimes of which he has been convicted—either by a trier of fact or by his own admission. As matters now stand, the evidence is insufficient for us to conclude, as a matter of law, that Dueno's 1994 guilty plea constituted an admission to the building invasion described by the police report.

Dueno, 171 F.3d at 7 (emphasis added). In its decision in this case, the district court relied on the language we emphasize. Although the court's reliance on this language is understandable, that reliance nevertheless reflects a misapplication of Harris, reaffirmed by the Dueno decision, and of Dueno itself.

C. Consideration of Police Reports and Complaint Applications

Dueno's reference to an admission by the defendant cannot be read apart from the inquiry framed in Harris: looking to the conduct in respect to which the defendant was charged and pled guilty, did "the defendant and the government both believe[] that the generically violent crime . . . rather than the generically non-violent crime . . . was at issue." Harris, 964 F.2d at 1236. In fact, having reaffirmed Harris, Dueno describes the sentencing court's inquiry into the meaning of the defendant's guilty plea in a specific sense that reflects Harris—does the defendant's plea of guilty "constitute an admission" to a crime of violence? *See Dueno*, 171 F.3d at 7 ("the evidence is insufficient for us to conclude, as a matter of law, that Dueno's 1994 guilty plea constituted an admission to the building invasion described by the police report") (emphasis added). The court's determination on the violent felony or crime of violence question does not turn on an

explicit admission by the defendant to alleged conduct in the sense of "yes, I struck the victim in the face," either at the time the defendant pled guilty to the earlier offense or when the enhancement issue arises at sentencing for a subsequent offense. Rather, the court's determination about the meaning of the guilty plea can be made on the basis of sufficiently reliable evidence independent of a fact-specific admission. *See United States v. Broce*, 488 U.S. 563, 570, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989) ("By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.").

Nevertheless, Harris and Dueno leave open the question of what documents are sufficiently reliable evidence for determining whether a defendant's plea of guilty constitutes an admission to a generically violent crime under a statute that encompasses violent and non-violent conduct. In Harris, we allowed the district court to rely on an uncontradicted PSR. In Dueno, where the court had used faulty reasoning in making its crime of violence determination, we declined to rule that the uncontradicted narration of events in the PSR established that Dueno had pled guilty to a crime of violence. Rather, in concluding that the issue reasonably could be decided either way, we pointed out that the government did not offer the police report from which the facts in the PSR were taken, nor any other document that was before the judge who accepted Dueno's plea.

Here, noting the deficiencies cited in Dueno, the government offered certified copies of police reports and complaint applications. Based on our precedents, we see no justification for an absolute bar to the consideration of such documents when the sentencing court must determine whether the defendant and the government both believed that the defendant was entering a guilty plea to a generically

violent crime.[10] Such a bar would make the use of prior convictions based on guilty pleas for purposes of the ACCA or criminal offender guideline enhancement hinge on the happenstance of state court record-keeping practices. The enhancement would only apply when a plea agreement or a plea transcript had been preserved that showed a defendant pled guilty to a violent felony or a crime of violence. Indeed, in Dueno, where we could have easily adopted a bright-line rule barring the use of police reports, we did not. We noted instead the absence in the record of "a copy of the police report in question" or of "an explanation where the police report came from." Dueno, 171 F.3d at 7. These specific deficiencies made the PSR account insufficiently reliable for us to determine as an initial matter and as a matter of law that Dueno pled guilty to breaking and entering into a building.

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[10] Other circuits have not addressed the precise question of whether police reports and complaint applications are reliable evidence for determining whether a defendant has pled guilty to a violent crime when the statute under which he is charged addresses violent and non-violent conduct. Some courts, however, have allowed consideration of documents such as PSRs, plea agreements, and plea transcripts. *See United States v. Bonat*, 106 F.3d 1472, 1476 (9th Cir. 1997) (district court properly relied on plea transcript to determine whether defendant pled guilty to generic burglary); *United States v. Adams*, 91 F.3d 114, 116 (11th Cir. 1996) (district court properly considered PSR to determine whether defendant's prior conviction was for generic burglary); *United States v. Hill*, 53 F.3d 1151, 1154 (10th Cir. 1995) (en banc), cert. denied, 516 U.S. 900, 133 L. Ed. 2d 182, 116 S. Ct. 258 (1995) (district court may consider text of guilty plea and/or other documents that, coupled with the charging instrument, enable the court to determine that defendant's prior conviction was for generic burglary); *United States v. Gallman*, 907 F.2d 639, 645 n.7 (7th Cir. 1990), cert. denied, 499 U.S. 908, 113 L. Ed. 2d 219, 111 S. Ct. 1110 (1991) (district court should refer to plea agreement or plea transcript to determine whether defendant's prior conviction was for generic burglary). But *see United States v. Barney*, 955 F.2d 635, 639 (10th Cir. 1992) ("we do not hold . . . that the sentencing court determining enhancement may rely on the presentence report").

The district court in this case did not attempt to evaluate the reliability of the police reports and complaint applications as a basis for the finding contemplated by both Harris and Dueno—whether the defendant and the government both believed that Shepard was entering guilty pleas to the generically violent crime of breaking and entering a building. In addressing that issue, the court should have asked the kind of questions suggested by our precedents. As discussed in Dueno, did the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct? Where did the police reports come from? What took place at Shepard's plea hearings? More specifically, as discussed in Harris, did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime? We cite these questions from our precedents as illustrative of the kind of inquiry that should be made. They are not offered as an exhaustive list.

The reference above to a defendant's contesting the facts set forth in a police report requires us to address a confusion relating to the concept of an admission when the enhancement issue arises at sentencing. The district court stated that "if the relevant facts contained in the PSR are uncontested, the court may consider these as further admissions by the defendant." *See also Dueno*, 171 F.3d at 7; Harris, 964 F.2d at 1236-37. That statement is accurate. Such admissions would be important for the reasons they were important in Harris:

> These two items of uncontested and uncontradicted information make clear that neither of the two "assault and battery" crimes for which Harris was charged and

> convicted were "nonconsensual touching" crimes, and both were of the "physically harmful" or "potentially physical harmful" variety.

Harris, 964 F.2d at 1237. These admissions during the sentencing process are an example of reliable evidence that would permit a sentencing court to conclude that the defendant's guilty plea to a prior offense constituted an admission to a generic violent felony or crime of violence. But it does not follow from this proposition that any objection posed by a defendant at the time of sentencing to the facts set forth in a PSR, or in an underlying police report or complaint application, precludes the court from finding that the defendant's guilty plea constituted such an admission. Such a result would be inconsistent with the preponderance of the evidence standard that generally applies when a court determines whether a defendant qualifies for an enhancement under the ACCA or career offender provision. *See United States v. Spell*, 44 F.3d 936 (11th Cir. 1995).

Therefore, the nature of the objection posed to a PSR, or to underlying documents relied upon by the government, must be considered carefully. The district court suggests that Shepard contested the accuracy of the facts in those documents that are relevant to whether he committed a generically violent crime. "At no point—then or now, during the various plea colloquies, or at this sentencing—did Shepard concede the facts on which the government now relies. Indeed, Shepard expressly contested any characterizations of these convictions that went beyond the words of the complaint." However, Shepard's Taylor-based categorical objection to the use of the complaint applications and police reports does not challenge the accuracy of the statements in those documents describing entries into buildings. Shepard stated that these documents generally carry a high risk of unreliability without ever explaining why that was true in his case. Shepard's general challenge to the appropriateness of the PSR setting

forth accounts of his past crimes, or to the reliance on police reports and complaint applications for those accounts, left those accounts uncontradicted, just as they were in Harris and Dueno.

We cannot anticipate the specific objections that Shepard might pose to the government's documents. We can emphasize, however, that the issue before the sentencing court is not what Shepard did to provoke the criminal charges to which he pled guilty. Rather, the issue, again, is the one framed in Harris: did the defendant and the government both believe at the time Shepard entered his pleas "that the generically violent crime . . . rather than the generally non-violent crime . . . was at issue." *Id.* 964 F.2d at 1236. To conclude otherwise would enmesh the district court in the kind of factually disputed "archeological dig" about the defendant's conduct that Taylor guards against, with all the attendant practical difficulties of holding mini-trials on a defendant's prior convictions. *See Winter*, 22 F.3d at 19.

Shepard's objections to the government's police reports and complaint applications might focus, for example, on any inconsistencies or ambiguities in their description of the defendant's conduct, or any circumstances relating to the creation or reproduction of the documents, that affect their usefulness for determining whether Shepard and the government both believed that an entry into a building was at issue when he entered the guilty pleas. Or Shepard might offer an account of what took place at his plea hearings, including the documents before the judge, that raises questions about that issue. If the government needs to respond to such objections, the response should usually be "limited to examining easily produced and evaluated court documents, including the judgment of conviction, charging papers, plea agreement, presentence report adopted by the court, and the findings of a sentencing judge." Spell, 44 F.3d at 939. To that list we add

transcripts of the plea hearing or other documents that were before the judge who accepted the guilty plea at issue.

In the face of plausible objections from Shepard, and in the absence of a sufficient response from the government, the court may decide that it cannot conclude by a preponderance of the evidence that his pleas of guilty constituted admissions to unlawful entries into buildings. The government, of course, "bears the burden of proving the applicability of an upward adjustment under the guidelines [or the ACCA]," Dueno, 171 F.3d at 7.

III.

In Taylor, the Supreme Court said that the sentencing court could go beyond the mere fact of conviction "in a narrow range of cases where a jury was actually required to find all the elements of generic burglary." Taylor, 495 U.S. at 602. By examining the indictment or information and jury instructions in such cases, the court could conclude "that the jury necessarily had to find" that the defendant had been convicted of the violent felony of entry into a building, i.e. a violent felony. *Id.*

The concept of a necessary finding does not apply to disputes about the meaning of a defendant's guilty plea, and whether that plea constitutes an admission to a violent felony or a crime of violence. As we have indicated, those disputes must be resolved by a finding of fact pursuant to the preponderance of the evidence standard. Such a finding is not a necessity. It is based on a judgment about the weight of the evidence.

Without minimizing the high stakes involved in sentencing enhancements, we note that courts routinely resolve factual disputes during sentencing hearings. We see no reason why disputes about the meaning of a defendant's guilty plea should be immune from that process, so long as the inquiry is

consistent with the principles of Taylor. We believe that we have described such an inquiry here.

In Taylor, the Supreme Court explained why it would be unfair for a sentencing court to look to the facts underlying the prior conviction to determine if a defendant had pled guilty to a violent felony. "Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." Taylor, 495 U.S. at 601-02. We, of course, agree. It would be decidedly unfair to determine subsequently, for the purpose of sentence enhancement under the ACCA or the career offender guideline, that the conviction resulting from a guilty plea was for a violent crime, based on the actual conduct of the defendant, when the defendant in fact pled guilty to a non-violent crime. But we see no unfairness in a court deciding on the basis of sufficiently reliable evidence that the government and the defendant shared the belief that the defendant was pleading guilty to a generically violent crime, and hence the defendant's plea constituted an admission to such a crime.

We also see no unfairness in a point emphasized by the district court in its decision rejecting consideration of the police reports and complaint applications—namely, that Shepard had no appreciation of the importance of challenging the location of the breaking and entering when he pled guilty to the breaking and entering charges in the Massachusetts courts because he could not anticipate that his convictions for these charges would be so important for subsequent sentencing under the ACCA. Logically, the premise of this concern is that Shepard would have tried to minimize his criminal history because of the possibility that he would commit another crime. We do not find persuasive a fairness argument grounded in such a premise. Sentencing enhancements do not punish a defendant for the prior criminal

conduct. *See Nichols v. United States*, 511 U.S. 738, 747, 128 L. Ed. 2d 745, 114 S. Ct. 1921 (1994) ("Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction."). Rather, enhancements provide for "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger v. Burke*, 334 U.S. 728, 732, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948).

In summary, the court below concluded that it could not consider the police reports and complaint applications offered by the government because of its erroneous view that the violent felony determination could only be based on adjudicated or specifically admitted facts. The court did not carry out the required analysis of whether the documents before it constituted sufficiently reliable evidence of the government and the defendant's shared belief that the defendant was pleading guilty to the unlawful entry of a building. We therefore vacate the sentence and remand for resentencing.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 98-10262-NG

UNITED STATES OF AMERICA,

v.

REGINALD SHEPARD,

Defendant.

DEFENDANT'S SUPPLEMENTAL RESENTENCING MEMORANDUM

On July 14, 1999, this Court sentenced Mr. Shepard to 46 months in prison on hid guilty plea to a violation of 18 U.S.C. §922(g). The presentence report calculated Mr. Shepard's guide-line range to be 30 to 37 months with a Criminal History Category of 6. The government moved for an upward departure on the grounds that a CHC of six (6) did not adequately reflect the seriousness of Mr. Shepard's criminal history. The 46 month sentence imposed by the Court represented a two level upward departure from an adjusted base offense level of 12 to level 14; 46 months is the highest sentence available in level 14, with a CHC of six (6).

A. None Of The Records Of Shepard's State Convictions Establishes On Its Face Whether It Is For Generic Burglary.

Mr. Shepard did not challenge the constitutional validity of any of the convictions used to calculate his criminal history

category.[1] For purposes of calculating Mr. Shepard's criminal history, it made no difference whether his B&E convictions involved buildings. However, the government has succeeded in importuning the First Circuit to require this Court to look beyond the "mere fact of conviction" to determine whether Mr. Shepard qualifies for sentencing as an armed career criminal. Now fairness demands that Mr. Shepard be put in position to respond by challenging the government's claim that the pleas established facts not manifest in the state court record, even if that requires or involves a "collateral attack" on the state convictions themselves.

Mr. Shepard has filed an affidavit challenging the government's assertion that he admitted to the facts contained in the various police reports relied upon by the government. This Court is called upon to answer questions about what happened in these various state district courts at the time Mr. Shepard offered his pleas. This factual inquiry goes well beyond the fact of a prior conviction, see, *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362-2363 (2000) and calls upon the district court to determine what happened in the state court plea proceedings concerning fact issues which have significance in this federal proceeding years afterward, but which were not necessarily addressed then because they are not necessarily elements of the crimes charged. Such a procedure offends due process in at least two ways: 1) it requires this Court to decide, by a preponderance of the evidence, whether Mr. Shepard was actually guilty of breaking into a building with the requisite criminal intent; and 2) it requires the Court to decide, by a preponderance of the evidence, whether Mr. Shepard actually admitted all of the facts and elements necessary to support a valid conviction for a "violent felony". Because proof of such facts would serve to enhance Mr.

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[1] Mr. Shepard acknowledges that such challenges to his convictions would have to have been brought in state court. *Daniels v. United States*, 121 S.Ct. 1578, 1583 (2001).

Shepard's sentence beyond the statutory maximum of ten years, to a mandatory minimum 15 years, the constitution requires that they first be charged and then proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362-2363 (2000)("Other than the fact of a prior conviction, any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.")

B. Mr. Shepard Has A Cognizable Interest In Finality And Cannot Fairly Be Required To Litigate Whether Non-Elementary Circumstances Were Adjudicated In His Guilty Pleas.

In addition, this is an inquiry that has generally been forbidden to the federal district court, not because this Court lacks the competence to make the inquiry, but because the inquiry defeats the justice system's dual overriding interests in ease of administration and promoting the finality of judgments. *Daniels v. United States*, 121 S.Ct. 1578, 1581 (2001). The First Circuit has invited Mr. Shepard to mount various challenges to his state convictions in response to the government's resort to police reports and complaint applications as evidence of what his guilty pleas adjudicated. *United States v. Shepard*, 231 F.3d 56, 67-68 (2000) Of course Mr. Shepard is not ordinarily permitted to attack the validity of his state court convictions in the federal sentencing proceeding. *Custis v. United States*, 511 U.S. 485, 497 (1994) (". . . § 924 (e) does not permit Custis to use the federal sentencing forum to gain review of his state convictions."); *Daniel v. United States*, supra, at 1580; see also, *United States v. Mateo*, 271 F.3d 11, 16 (1st Cir. 2001) (". . . [T]he sentencing guidelines do not compel district courts to inquire beyond the face of the state-court record. . . ."); *United States v. Correa*, 114 F.3d 314, 317 (1st Cir. 1997)(". . . [W]hen a federal court is obliged to tabulate a defendant's criminal history score for sentencing purposes, limiting the requisite

inquiry to the formal record . . . strikes the right balance."); United States v. Brackett, 270 F.3d 60, 65-66 (1st Cir. 2001). These criminal proceedings led to convictions without adjudication of whether the breaking and entering involved a building or a vehicle. The government now seeks, in effect, to collaterally reopen[2] these proceedings in an effort to prove that they involved factual circumstances which are not elements of the crime charged and which are not shown on the face of the judgment to have been established. Its effort to inquire into the judgments of the state court are as offensive to the system's interests in ease of administration and finality as any "collateral attack" raised by a defendant in a sentencing proceeding.

Of course the government has not been able to produce the record of the plea colloquies for the convictions at issue.[3] Thus, this Court is placed in the very same inappropriate position it would be in if Mr. Shepard attempted to challenge the validity of one of these ancient convictions:

> . . . [A] district court evaluating a § 2255 motion is as unlikely as a district court engaged in sentencing to have the documents necessary to evaluate claims arising from long-past proceedings in a different jurisdiction. While petitioner is quite right that federal district courts are capable of evaluating fact-intensive constitutional claims raised by way of habeas petition . . . institutional competence does not make decades old state court records and transcripts any easier to locate.
>
> The facts of this case only reinforce our concern.

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[2] As Justice Souter points out in his dissent in *Custis*, "[t]he Court's opinion makes clear that it uses the phrase 'collateral attack' to refer to an attack during sentencing." 511 U.S. at 498, n.2.

[3] This Court has repeatedly called for the government to produce transcripts of plea colloquies and that remains a option even in light of the First Circuit's opinion in this case. 231 F.3d at 69.

> For example, petitioner contends that he entered his 1978 and 1981 guilty pleas without a full understanding of the essential elements of the crimes with which he was charged, and therefore the resulting convictions violated due process. . . . These claims by their nature require close scrutiny of the record below. Yet petitioner has not placed the transcript from either plea colloquy in the record. In fact, he has admitted that the 1978 transcript is missing from the state court file. . . . *Under these circumstances, it would be an almost futile exercise for a district court to attempt to determine accurately what was communicated to petitioner more than two decades ago.* (Emphasis added.)

Daniels v. United States, 121 S.Ct. at 1581.

No reason has been advanced by the government establishing why it should be permitted to undertake an examination of a state court judgment of conviction as intrusive and as revisionist as that which is forbidden to a criminal defendant at sentencing.

The unreliability of the records of Massachusetts District Court convictions is notorious, even when the inquiry is limited to whether the constitutional requisites were honored. In fact, the records of guilty plea proceedings are so poorly maintained and so frequently unavailable that the Supreme Judicial Court recently established a "presumption of regularity" which the challenging defendant must overcome, with credible and reliable factual evidence, before the Commonwealth is required to demonstrate that the defendant's constitutional rights were protected in the plea proceeding. *Commonwealth v. Lopez*, 426 Mass 657, 661-63, 665 (1998). In these circumstances, the government's argument that the Court should infer from police reports or pre-charging documents that specific circumstances were adjudicated in plea proceedings for which no record exists is simply not reasonable.

If the Court is authorized to investigate and adjudicate these issues in this sentencing proceeding, equity and due process require that other issues de hors the record be open to investigation. *Wardius v. Oregon*, 412 U.S. 470 (1973). For example, if defendant was not asked, during his plea colloquy, to personally admit the facts that establish the elements of the offenses, or the defendant was not informed of the elements of the offense to which he pled, his conviction is invalid:

> The defendant does allege, however, that the judge failed to ascertain that he had knowledge of the elements of the charges against him; the record bears this out. Nothing more need be shown to establish the inadequacy of the colloquy for constitutional purposes. *Henderson v. Morgan*, 426 U.S. [637] at 645-646, 96 S.Ct. at 2257-2258. . . .
>
> We conclude that the plea colloquy at issue was fatally deficient. [Footnote omitted] The defendant did not explicitly admit to or acknowledge any of the facts underlying the charges, and the judge did not advise the defendant of the nature of the charges, their elements, or the penalties involved. Nor was there any representation that the defendant's attorney had explained to him the elements he admitted by his plea. The record does not demonstrate that the defendant knew the exact nature of the charges to which he was pleading guilty.

Commonwealth v. Correa, 43 Mass.App.Ct. 714, 719-720, 686 N.E.2d 213, 217-218 (1997)(Reversing trial court denial of a motion for new trial); see also, *Mack v. United States*, 635 F.2d 20, 24-26 (1st Cir. 1980)(Prejudicial violation of Rule 11 occurred where court failed to determine that the defendant understood the nature of the charges).

There is no reason to assume, without the benefit of a formal record of the plea, that the facts constituting each element of the offense were admitted. See, *United States v. Payne*, 894 F.2d 534, 537 n. 7(D.Mass.1995)(pointing out the

"surprising infirmity" of Massachusetts state court convictions revealed by the increased scrutiny they have received in light of enhanced federal sentences). Problems with Massachusetts state court plea proceedings continue. Attached hereto is a ruling by Massachusetts District Court Judge Hodos date November 21, 2001, granting a new trial where the government failed to establish a factual basis for the offense and the court failed to inquire of the defendant whether she admitted to the facts and understood the elements of the offense.

There is reason to doubt the adequacy of the records of the pleas at issue in this case. Mr. Shepard denies that he admitted to the facts as recited in the various police reports and PSR. For example, with regard to Waltham District Court Complaint No. 9151CR1100, there are conflicting reports of Mr. Shepard's possession of a "master key". One report asserts that "when suddenly the door opened, standing there was suspect holding a master key." Another report states that "[a]ccording to both employee's [sic] this door was locked and the only way in was with a key which they *suspect* Shepard had in his possession." (Emphasis added) The longer report indicates the inability to locate an important cab driver witness and the absence of sufficient evidence that Shepard committed a larceny from the store. This suggests that the Commonwealth may not have been able to establish a factual basis for the requisite intent. The report suggested that Shepard be charged with "Breaking and Entering Fetters store on 3-11-91. . . ." If the defendant pled to simple breaking and entering, he pled to facts that do not constitute a crime. *Commonwealth v. Vinnicombe*, 28 Mass.App.Ct. 934, 935 (1990)("[T]he defendant was convicted by a jury of simply 'breaking and entering.' In the lexicon of Massachusetts crimes there is no such crime as 'breaking and entering' unaccompanied by intent to commit a felony or a misdemeanor.").

Mr. Shepard's affidavit challenges the government's claim that he admitted in each of these contested proceedings to having burglarized a building. The government's documents contain information casting doubt on the proposition that burglary was even a factually supportable charge in each case. It has failed to produce evidence from which the Court could reasonably infer that in each plea, it was adjudicated that Mr. Shepard burglarized a building, a fact which is not likely to have even been addressed except inadvertently because it is not necessarily an element of the crime charged. This Court should refuse to resort to this level of speculation; rather, it should find that the government has failed to meet its burden of proof, and reimpose the sentence originally determined to be appropriate.

Respectfully submitted,
Reginald Shepard, Defendant.

/s/ Linda J. Thompson
LINDA J. THOMPSON, BBO #496840
His Attorney
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Certificate of Service

The undersigned hereby certifies that a true copy of the foregoing Motion, with Exhibits, was served on the government by first class mail, postage prepaid, on the 11th day of December, 2001.

/s/ Linda J. Thompson
LINDA J. THOMPSON, BBO #496840

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 98-10262-NG

UNITED STATES OF AMERICA,

v.

REGINALD SHEPARD,

Defendant.

AFFIDAVIT OF REGINALD SHEPARD
PERTAINING TO RESENTENCING MATTERS

I, REGINALD SHEPARD, being aware of the penalties for perjury, state on my oath that:

1. I am the same person who is named as the defendant in the above captioned case;

2. I have read the Boston Police Incident Report offered by the government with regard to Dorchester District Court Complaint No. 8907CR4433. The copy provided by the government was not very clear and I have trouble telling what some of the words are. However, I am sure that, at the time of my submission in Dorchester District Court, the judge did not read this Incident report to me and did not ask me whether or not the information contained in the Incident report was true. I did not admit the. truth of the information contained in the Incident report as part. of my plea and I have never. admitted in court that the facts alleged in the reports are true;

3. I. have read the Incident/Arrest Report dated 3/11/91 and Watertown Police Department report dated 3/21/91 submitted by the government in connection with Waltham District Court Complaint No. 9151CR1100. I have noticed

that the Incident/ Arrest Report states that "when the door suddenly opened, standing there was suspect holding a master key." I have also noticed that the Watertown Police Department report states "NOTE* According to both employee's this door was locked and the only way in was with a key which they suspect Shepard has in his possession. They believe that upon Shepards termination a few weeks prior he never turned his stores keys into [sic] the manager." Finally, I noticed that the Watertown Police Department report requests that I be charged with "Breaking and Entering Fetters store on 3/11/91 at 1450 hrs." but also states that there is not sufficient evidence to prove larceny. The only charge requested on the available evidence in "breaking and entering." I am sure that, at the time of my submission to sufficient facts in Waltham District Court, the judge did not read either the Incident/ Arrest Report or the Watertown Police Department report to me and did not ask me whether or not the information contained in those documents was true. I did not admit the truth of the information contained in those documents as part of my submission and I have ever admitted in court that the facts alleged in the reports are rue;

4. I have read the Boston Police Incident Report dated 7/17/91 that the government submitted in connection with Dorchester District Court Complaint No. 9107CR5135. I am sure that, at the time of my submission in Dorchester District Court, the judge did not read this Incident report to me and did not ask me whether or not the information contained in the Incident report was true. I did not admit the truth of the information contained in the Incident report as part of my plea and I have never admitted in court that the facts alleged in the report are true;

5. I have read the Boston Police Incident Report dated 2/3/94 that the government submitted in connection with Dorchester District Court Complaint No. 9407CR00559. I am sure that, at the time of my submission in Dorchester District

Court, the judge did not read this Incident report to me and did not ask me whether or not the information contained in the Incident report was true. I did not admit the truth of the information contained in the Incident report as part of my plea and I have never admitted in court that the facts alleged in the report are true;

6. I have read the entire presentence report that was prepared by Ms. Bridgeman in my case. I refer specifically to paragraphs (54) and (55) as paragraphs that I have read. I notice that no certified records were provided to the court by the government in connection with this alleged conviction at the time of my sentencing. The presentence report does not assert the I admitted to the truth of the facts stated in these paragraphs and I affirmatively state that no court read these facts to me and asked me whether they were true or if I admitted that they were true. I have not made as admission in any court that the facts set forth in these paragraphs are true;

7. I have read the entire presentence report that was prepared by Ms. Bridgeman in my case. I refer specifically to paragraphs (59) and (59A) as paragraphs that I have read. The presentence report does not assert the I admitted to the truth of the facts stated in these. paragraphs and I affirmatively state that no court read these facts to me and asked me whether they were true or if I admitted that they were true. I have not made an admission in any court that the facts set forth in these paragraphs are true;

8. I have read the entire presentence report that was prepared by Ms. Bridgeman in my case. I refer specifically to paragraphs (69) and (69A) as paragraphs that I have read. The presentence report does not assert the I admitted to the truth of the facts stated in these paragraphs and I affirmatively state that no court read these facts to me and asked me whether they were true or if I admitted that they were true. I have not made an admission in any court that the facts set forth in these paragraphs are true;

9. I have read the entire presentence report that was prepared by Ms. Bridgeman in my case. I refer specifically to paragraphs (71) and (71A) as paragraphs that I have read. The presentence report does not assert the I admitted to the truth of the facts stated in these paragraphs and I affirmatively state that no court read these facts to me and asked me whether they were true or if I admitted that they were true. I have not made an admission in any court that the facts set forth in these paragraphs are true;

10. I have read, the entire presentence report that was prepared by Ms. Bridgeman in my case. I refer specifically to paragraphs (77) and (77A) as paragraphs that I have read. The presentence report does not assert the I admitted to the truth of the facts stated in these paragraphs and I affirmatively state that no court read these facts to me and asked me whether they were true or if I admitted that they were true. I have not made an admission in any court that the facts set forth in these paragraphs are true;

11. I have read the entire presentence report that was prepared by Ms. Bridgeman in my case. I refer specifically to paragraph (30) as a paragraph that I have read. The presentence report does not assert 'the I admitted to the truth of the facts stated in this paragraph and I affirmatively state that no court read these facts to me and asked me whether they were true or if I admitted that they were true. I have not made an admission in any court that the facts set forth in these paragraphs are true;

12. I have read the entire presentence report that was. prepared by Ms. Bridgeman in my case. I refer specifically to paragraphs (33) and (34) as a paragraphs that I have read. The government has not submitted certified copies of any documents with regard to these alleged convictions and the government did not rely on these convictions at my original sentencing hearing. At my original sentencing hearing on July 7, 1999, the government relied on five (5) convictions

for enhancement of my sentence and those were the convictions reflected in paragraphs (52)-(54), (56)-(57), (68)-(69), (70)-(71), and (75)-(76) of the presentence report. Certified copies of various documents were provided to the court in connection with every. conviction except the one alleged. to be reflected in paragraphs (52)-(54) of the presentence report and, for that conviction, no supporting documents were provided;

Signed under the pains and penalties of perjury this 13th day of December, 2001.

/s/ Reginald Shepard
REGINALD SHEPARD

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 98-10185-NG

UNITED STATES OF AMERICA

v.

REGINALD SHEPARD

Boston, Massachusetts
December 13, 2001

TRANSCRIPT OF RESENTENCING PROCEEDINGS
BEFORE HON. NANCY GERTNER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by stenotype with
computer-aided transcription.

[5] THE COURT: Okay. Well, I'd like to hear from you in writing, Ms. Pellegrini. I'd like to put off this decision.

Let me be quite candid. I am—I'm confused by what the Court of Appeals wants me to do. And if I can lay out what I think that the issues are, and then I'd be happy to hear from you, and then we'll set this down again. I'm sorry to delay it. It's delayed for such a long time, but I'm really not at all sure of what the Court of Appeals wants me to do.

The Court of Appeals is not overturning, obviously, Harris and Taylor. It seems to me that their inquiry is still the inquiry of what did Mr. Shepard plead to, not what did [6] Mr. Shepard actually do.

And in the conclusion of the decision, Judge Lipez reiterates that. The quote is somewhere—says that, "At the conclusion of the evidence the Court may decide it can conclude by a preponderance of the evidence that his pleas of guilty constituted admissions of unlawful entries of the buildings."

So, it looks like the focus is on what he pled to, not what he did. And, consistent with that, I have to look at the plea colloquy, of which I understand there is none.

If the police report were attached to the plea colloquy, then I could assume that Mr. Shepard had agreed to the contents of the plea colloquy and I could assume that that's what he pled to. But we don't have a plea colloquy. We have no way of reconstructing it.

So then the question is what do I do about the police reports.

Now, if the inquiry is what did he plead to and not what he did, and we can't show that the police reports were part of the plea colloquy, how are the police reports at issue, then, in this case? How do we use that if the inquiry is what he pled to.

There is language in the decision that suggests that the mere objection to the police—to the convictions in the presentence report are not sufficient. The defendant says that they object to the PSR's recitation of factual information [7] drawn from police reports and complaint applications. The implication in the decision is that that somehow is not enough.

Now, again, not enough for what purpose? Not enough to show what he did, or not enough to show what he pled to?

And the change in the affidavit which says—again, is focused on what happened at the plea—I read the Boston Police incident report; I'm sure no one read it to me; I don't admit to the truth of the information contained in it; I never admitted in court to the facts. Is that sufficient under the Shepard decision now, and then it is sufficient for what? If my inquiry is what he pled to rather than what he did, where does the police report come into all of that?

It occurred to me that one thing the Court may be saying, which is a little complicated, is—let me back off again.

So, first, the inquiry is what he pled to. The question is who has the burden of proving what he pled to? The absence of the colloquy then redounds in whose favor and whose disadvantage? And then what do I do about the police report?

Now, one way of interpreting Judge Lipez's decision is to say that what he's saying is that what Mr. Shepard has to do is to say, "I didn't do what they said I did." And then, unless he says that, he hasn't even—I'm not sure how he means it—put this in issue. That unless that—that he has to say, "I didn't say what they said I did," he has to deny it [8] on the merits. And from which I then infer that he, therefore, if he says, "I didn't do it," then I can then infer he, therefore, couldn't have pled to it, and, therefore, this conviction couldn't have been about that.

That strikes me as an enormous set of leaps; that he has to deny the merits of the underlying police report in order to ask the question that is central to the decision, which is what he pled to.

But that seems to be what the government said I should have to find. I have to find that he has to deny—he has to say, "I didn't go into a building, I went into a car.

Well, I didn't do what they said I did." And from that I can then infer that he couldn't have pled to it, and, therefore, the conviction could not have been about a house, it would have to be about a car.

But if he said that, if he came forward and said to me, "I didn't do what they said," what do we have, a trial here to determine whether he's telling the truth? And isn't that exactly what Taylor and Shepard prohibit, which is a mini-trial on the question of what the conviction is really about?

So, let me just sort of—let me make a list of my questions. My questions continue to be what am I resolving here? Am I resolving what he did or what he pled to?

If I'm resolving what he pled to, whose burden is it to prove what he pled to?

[9] If it is the defendant's burden, has he met that burden by this affidavit, or does he have to say more?

If it is the government's burden, have they met the burden by the police report, even if we can't reconstruct the colloquy.

Or are—so that's the—or am I totally off base about what this decision means? I suppose that's another possibility.

So, that's one box of what the decision was.

The second box here is Apprendi. And it seems to me that that's an argument that Ms. Thompson, really, you have to—you have to persuade me that the Supreme Court's decision in

Almendarez-Torres and my decision in Gomez-Estrada, which was affirmed a couple of weeks ago–

MS. THOMPSON: I'm familiar with it.

THE COURT: Right, doesn't eliminate that as an issue in this case. And, you know, it seems to me that—I don't see where Apprendi fits into this.

So that's my understanding what the issues are. I know that we're approaching the holidays. How much time do you need, Ms. Pellegrini?

MS. PELLEGRINI: I just need a week or so, your Honor. I don't think, frankly, with all due respect, that the issue is all that complicated.

THE COURT: You think the issue is what?

[10] MS. PELLEGRINI: The issue is—it is exactly what did the defendant plead to. And, quite simply, since we have—we're dealing with one statute. It's not a question of trying to determine, oh, my gosh, which statute did the defendant plead to, you know, that there's no indication of what the crime was, or anything like that. What we're merely trying to determine and what the Court has to determine is what portion of that statute was the government and the defendant talking about at the time he took his plea.

Because the burglary statute contains the two separate elements: The element of in a building, which is the violent offense, which is the one in question, which would allow for the enhancement of a sentence; or the vessel or car, which is not.

And what the government is saying and what I think Judge Lipez is saying is, quite simply, it's not a question of looking into the conduct, but what was before the Court so that you can make a determination as to what portion of that statute he pled to, knowing that, in fact, he did enter a plea to that statute.

So, all of the other issues raised in the supplemental memorandum regarding I wasn't advised by the Court seemed to me to be Custis issues and impermissible inquiry at this particular point in time. That if you're trying to determine what portion of the statute he pled to and what can [11] you rely on, what is reasonable and reliable and credible.

And I think Judge Lipez's decision underscores this.

What the government has always said is those documents that were before the state court at the time that it took his plea, those documents that come from its file showing that, in fact, the defendant was charged with that portion of the statute which says that he entered a building would allow you to reasonably conclude that, in fact, he entered a plea to that portion of that statute, because why—

THE COURT: This was before the judge in the plea colloquy? We don't know that. We know it's in the file.

MS. PELLEGRINI: No—well, we know it was in the file. Is the Court prepared to say, then, that the state court, having that in its file, would merely ignore it and take a plea to a portion of the statute which has nothing to do with the elements or the statement that before it?

And there's nothing that either the defendant or those documents show which would allow the Court to come to that conclusion that, in fact, the state court ignored what was before it and took a plea to a completely separate portion of the statute.

THE COURT: No, but the question is—the question is that the police report was unlitigated. No one challenged it, because there was a plea. So, if there was a version of the facts that was different, and that version didn't matter to [12] the outcome—

MS. PELLEGRINI: But that—

THE COURT:—as oftentimes happens, you plead to the generic crime.

The other issue is sort of an institutional issue.

Even if one believes in this case that—that, as you believe strongly, that it doesn't matter, the overarching question is that when do we look—when you're talking about a bump in sentence of the nature of the ACCA bump, was there some reason why the Supreme Court looked at the categorical test rather than relitigating the issues. And that reason had to do with, I think, sort of a generalized due process concern. That when there's a bump of that degree, we want to make sure that somewhere somehow the formalities were met.

MS. PELLEGRINI: Your Honor, in that regard, let me go back to Judge Lipez's statement, in which he says that the defendant might offer an account of what took place at his plea, including documents that raises questions about that issue, that issue being what was it that he pled to, not the circumstances under which he took the plea.

The fundamental due fairness argument that the Court has raised previously and that Ms. Thompson raises now seems to me, first of all, to spill over again impermissibly into a Custis inquiry, and without regard to the fact that the due process and the question of finality of the plea also works [13] with respect to what the government and the citizens of the United States have to have a right to expect, too, that there's some kind of finality to the plea.

So that at this point, that when this defendant comes before a federal district court judge, with these pleas, unchallenged previously—

THE COURT: Unchallenged previously, but what was there to challenge? He pled guilty.

MS. PELLEGRINI: Exactly.

THE COURT: But the implication of that is that, in a plea where one pleads to an ambiguous situation, the negotiated plea oftentimes may or may not reflect the same thing that a litigated trial would be. There are all sorts of things that are left unsaid.

MS. PELLEGRINI: Your Honor, but why is it that the Court would assume that what would be left unsaid here would be whether or not, with the entry into a building—because it's not as if a plea to burglary with respect to a vessel or a car is a lesser included.

THE COURT: Uh-huh.

MS. PELLEGRINI: So, why is it that one would assume that a plea would permit the defendant to plead to that—to facts which were not before the district court judge? Why would you assume that would take it completely out of the issue of the building or—in one case there was—in two cases [14] there were houses, in one case it was a business location—and say, okay, the defendant obviously, then, took a plea to entering a vessel or entering a car.

I mean, if we're trying to determine what that portion was, then that reliable evidence is before you, and what the defendant has done—has done nothing to disturb that.

THE COURT: Well, we now—the Court is using the language of admissions. We're trying to think about if this were a civil case, and someone had pled guilty in a criminal proceeding to a generic crime, and then there's a civil case afterwards, and we want to admit—we want to say that the person admitted to X conduct. The ambiguity of the—all that you'd look at in a situation like that is what was said in the plea colloquy. What did the person admit to. What comprises legal admissions to what facts.

And, as to a civil case, we would not even begin to look at, well, what was before the district court. It would be what was

said in court, what representations were made, and does that comprise a party admission under whatever the rule is.

And the question is then whether, in dealing with a criminal case, where so much hinges on it, I should go further.

Now, I drew a distinction in my initial decision when I, in fact, departed upward based on the record. But there [15] really is a difference between the analysis that one does—the everyday analysis that one does in a trial—in a sentence, but we're entitled to look at reliable evidence to determine if the record overstates or understates the culpability.

But that's different language than the ACCA language and different language than Harris and Taylor.

Now, I find Judge Lipez's decision ambiguous. As I said, it's hard for me to understand—and you're helping me, actually, along these lines—how the police report that was not introduced at the plea colloquy, and not admitted to, not referenced at that moment, can figure into an understanding of what it was he pled to.

And what you're saying is it has to be that, because nobody said anything different.

MS. PELLEGRINI: That's—

THE COURT: Because why would the judge accept a plea to—you know, well, we don't know what the basis of what the judge accepted the plea to, because there was no plea colloquy.

We don't know what was said at that occasion.

MS. PELLEGRINI: Your Honor, with all due respect again, I think that the Court's emphasis on the plea colloquy is overstated. Understanding that that might be quite helpful, the point of Judge Lipez's opinion is that notwithstanding the fact that there isn't a plea colloquy in these cases before the

[16] Court, the Court can, in fact, make a determination as to what elements of the statute the defendant entered its plea to by looking at other reliable evidence. And what the government is saying is that reliable evidence has been presented; that we have met our initial burden of proof; and, at that point, the burden does shift, to answer the Court's next question, to the defendant.

As Judge Lipez sets forth, you know, that he might, in fact—the defendant might present objections to it. And they set forth, although not an exhaustive list, a list of how they might do that.

THE COURT: Right.

MS. PELLEGRINI: But all of that goes to that—to that other issue and doesn't go to the Custis issues that are raised by Mr. Shepard in his affidavit.

So, I think that at this point we're right back where we were when the initial sentence was vacated; that there's reliable, credible evidence before the Court that the defendant has pled guilty to at least three crimes of violence in the past and that the sentencing enhancement should apply.

THE COURT: Let me tell you what I'm going to do while I'm waiting for your—because I want to get the record in Harris and Dueno. I want to understand what the Court meant when they said, "Did the defendant provide anything at his plea hearing to contest the facts—at the plea hearings to contest [17] the facts in the police report, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime?"

I want to understand what about the record in Harris and Shepard—in Harris and Dueno led the Court to believe that somehow the defendant and the government were really on the same page as to what the defendant was pleading to. If

the record is as here, that would be one thing. But if, in fact, there they said in open Court yes this is what we've pled to, or something along those lines, that would be different.

But I want to understand exactly how the Court came to the conclusion that defendant and government were on the same page in those cases about what was pled to.

You're saying that it was because of the absence of a countervailing version of what happened in the record in the state court?

MS. PELLEGRINI: Well, actually, I think, in Dueno, though, it didn't go that far, because, in fact, in Dueno the government did not have what it has here.

THE COURT: Didn't have the police report.

MS. PELLEGRINI: Did not have the certified police reports. So that information was absent from the record before the district Court.

But I think Judge Lipez could not be clearer when he [18] says that, more specifically, after discussing Harris, did the defendant provide anything at his plea hearings. So, I'm assuming—we're not talking about this plea hearing, bviously, we're talking about those prior state hearings—to contest the facts set forth. And we have nothing.

THE COURT: But the question is whose burden is that? If it is your burden, the "nothing" means that there is no enhancement. If it is his burden, the "nothing" means that there is enhancement, or arguably. That's why I was caught up in the burden issue.

The decision is replete with references to going back to the plea colloquy. And so, the first question I had is, if I can't reconstruct that, what do I do?

And it looks like your answer is to say, well, we can't reconstruct that. But if the only thing in the file was this

police report, we can assume that the plea—that the plea was to the facts of the police report.

Boy, that's an assumption that is a troubling one to me.

MS. PELLEGRINI: Your Honor, again, I'm not so certain I see why it's so troubling. I mean, these documents—

THE COURT: It's not litigated by—

MS. PELLEGRINI: But that's the point. It doesn't have to be litigated. Because the question is what was there [19] to let the Court know what the defendant pled to?

We know he pled guilty to the burglary statute. So the only question is as to what portion. And so, why not look at the police reports, the incident report, the complaint, all of which are uncontradicted still, at this point, that the defendant entered a building, so that you can know that—

THE COURT: The question is whether or not Mr. Shepard has to say, "I didn't do the building, I did something else."

And if he said that, and if the defendant in the next case says that—let's assume that's what this case comes to stand for. What would the government do? Does that end the inquiry, or do you bring in the police officer to say, no, no, no, this was a building, or the complaining witness?

MS. PELLEGRINI: No, I'm not saying that the defendant gets up now and simply says, "Oh, I said I didn't do it," or whatever. Again, I think we are trying to construct something which, I think, is why the emphasis is on, well, did he contest it at the plea hearings, because we don't want to have to engage in that archaeological dig and rebuilding.

What we're looking at is what we had and what did the state court have before it at that time.

THE COURT: I see. So that the inquiry here is what he said—the defendant, in order to put this in issue, has to say,

"At the time of my plea I told them it was not a building, [20] it was a car."

MS. PELLEGRINI: Or, "And I contested it in some way." But not, "Oh, you know, here's the plea and you're right, here's all this information about entering a building.

But now I'm telling you"—well, actually, in Mr. Shepard's case, at this point in time he hasn't told us anything. He's never said he didn't enter those buildings. So—

THE COURT: But if we require—

MS. PELLEGRINI:—all of that is still there.

THE COURT:—defendants to say that, you really are in the area that the Court seems to be disproving that we get into. In other words, if somebody says, "I didn't do it. I pled to it because—you know, I didn't really do it," and then you have to bring in a police officer and I have to litigate a B & E from ten years ago, that's exactly what they don't want us to get into.

MS. PELLEGRINI: Your Honor, perhaps—I didn't mean to suggest that he should do that. All I'm saying is, even at this point, he hasn't even done that. So, where is the contest of the facts?

THE COURT: So, you're saying the contest here has to be I told them at the plea colloquy that it was X rather than Y?

MS. PELLEGRINI: Well, according to Judge Lipez's opinion, "Shepard might offer an account of what took place at [21] his plea hearings."

THE COURT: But, you see, he offers an account. And you say it's not so an account. He says nobody said anything, one way or the other. Doesn't that mean that, if you have the

burden, isn't that the end of it?

MS. PELLEGRINI: No.

THE COURT: He says, "Nobody said anything one way or the other, and since it didn't matter, I didn't contest."

MS. PELLEGRINI: No, your Honor, because I don't think he can simply just say, "No one said anything one way or the other," rotely, without specifics, and particularly in this case, where, if you read his affidavit, the language for each one is exactly the same, and say that it didn't take place. I don't think that's a meaningful contesting of the issues.

And I think that's, again, why this decision is quite clear that the finality of the plea—that there is this regularity of presumption that the plea went down the way it was supposed to go down, and that, in fact, it was a sufficient plea, that we're not going to relitigate it at this point, that we're not going to sit here and determine whether or not Mr. Shepard now says, "I didn't mean to enter a plea of guilty," but what would happen at that particular point in time for that plea, which remains uncontested.

THE COURT: Now, I'm—so it is as complicated as I suggested—

[22] MS. PELLEGRINI: No.

THE COURT:—because if it was—if you can presume the plea was regular, and it was certainly regular, but since the state court did not make the distinctions that we make here, it wasn't an issue. And so, it could have been regular. He could have had a lawyer. And since no one—since it didn't matter, no one said anything one way or the other.

MS. PELLEGRINI: But, your Honor, I think that again, in all of these cases, in fact, you don't have to think about whether or not he had a lawyer. I think that there are indications in those records that each and every time he was represented by counsel.

THE COURT: No, I'm not saying he wasn't.

MS. PELLEGRINI: All right. And also that for many of these convictions it indicates that he did, in fact, admit to sufficient facts.

And again, I don't—the greater leap, to me, is that one would consider that with those facts before the state court judge, that they would take a plea to an entirely separate set of facts.

THE COURT: No, what I'm saying is what if the facts were this. What if the situation were this, which is not unreasonable from what I recall from state practice. There is an indictment, which is general; there is a police report; [23] there is a great deal offered to the generic statute. You don't have to litigate what—the details of the police report, because it doesn't matter. This is not a lesser included offense. There's a plea colloquy, too. Did you agree to and they read the indictment? Did you do those things? And he says, "Yes."

MS. PELLEGRINI: Your Honor, why isn't that sufficient, when, knowing that the police report says you entered Fretters, you know, like 263 Commonwealth Avenue, to say that that's sufficient to say that both the government and the defendant understood that he was pleading to that portion of the burglary statute in which he entered a building?

THE COURT: Because—it may well be. And I'm not—I'm not—I'm genuinely struggling with this. It may well be.

But the issue is the defendant chooses to litigate or not litigate things in the course of a plea. And the decision not to litigate does not necessarily mean that it's true. And that's the problem that I'm having. The decision not to bother to litigate in a situation where it didn't matter in the state court does not necessarily mean that it's true.

MS. PELLEGRINI: Your Honor, I think that sort of analysis undercuts the plea, and I think it sort of bypasses the seriousness of a plea.

THE COURT: Well, I actually—I would agree with [24] you, except for the fact that what I did in this case was I departed upward because I thought there was a difference between the formality required for the ACCA and the formality required in evaluating an ordinary record. It made sense to me, as a matter of constitutional law, that the formality for the ACCA, where the bump is—the enhancement is so substantial, it made sense to the Court that Congress would talk about conviction and the Court would talk about plea and conviction, and that that was different from the language of the guidelines, which talked about reliable evidence.

So, it made sense that I could look below the surface of a conviction in one situation and not in another. And that's the issue that I'm—I mean, it seems to me the Court is saying look further, look deeper into the plea colloquy, and then it said the issue comes down to the issue that I'm saying, whose burden was it and is that burden met.

And you will say it has met a burden. It is meet by the facts. That the only accusation here was the complaint, the police report, and, therefore, we must assume that both the defendant and the government understood that that's what they were pleading to.

And I think that's an inference I can make by a fair preponderance of the evidence on this record.

[25] MS. THOMPSON: In fact, I think we all understand that if the Court has something before it, it means that the Court has something that it is considering, that it's for it's consid-eration, not simply in its file somewhere, as Mr. Shepard's letters to you came out of your file. That does [26] not mean that you're considering Mr. Shepard's letters because they're in your file, any more than the fact that you would be considering grand jury minutes if you had those.

The fact of the matter is all complaints have to start in some way. The complaints in the state district court start by a police officer coming in and asking for a complaint.

He attaches a document. Sometimes it's a police report.

That's it. That's what happens to that police report. It serves as the vehicle for obtaining a complaint. It doesn't go beyond that.

I have never, and I have been practicing in the state district court for—

THE COURT: You don't have to confess—

MS. THOMPSON: I won't confess, but I will say in excess of 20 years, and I have yet to see a judge pull a police report out of a file and do anything with it. In fact, most often they don't open the file. The docket is on the front of the file. They endorse the file. And the file is not even opened.

So, the first question here is did the court taking the guilty plea have before it the police report? There's no evidence that it had before it the police report. There is only evidence that there was a police report in the file as an aid to obtaining the complaint.

So, the first question can be answered by saying [27] there has been no evidence presented that it had the police report or complaint before it.

Where did the police reports come from? You know, what kind of questions are that to be asking Mr. Shepard?

Where did the police reports come from, Mr. Shepard? He doesn't know that. The government clearly is supposed to answer that question.

THE COURT: Well, she's answered it. She says it's in the file.

MS. THOMPSON: Right.

THE COURT: In the docket.

MS. THOMPSON: But how did they get into the file?

You know, that's the question. How did they get into the Court's file?

So, they are part of the file, but they are not part of the plea, as far as we can tell.

In addition to that, the third question is really a restatement of the second question. All right? What took place at Mr. Shepard's plea? More specifically, did the defendant provide anything to contest the facts set forth in the police reports, which, of course, weren't—the question there is were they before the court or not. Because if they weren't before the court, Mr. Shepard would not be contesting them; thereby suggesting that the government and the defendant did not share in understanding that he was pleading to an [28] offense that—and this is fairly key—had the elements—had the elements of a generically violent crime.

A building is not the only element of a generically violent crime here. And, as I've pointed out in our memorandum, when you talk, for example, about the Fretters report, if you look at the Fretters report, what you see is that there is a claim of a larceny during the time that Mr. Shepard was employed there. All right? And that as a result of that larceny, with no evidence that Mr. Shepard—to convince anybody that Mr. Shepard actually did it, Mr. Shepard lost his job. All right? Later he is supposedly—and there's a conflict in the facts listed in the reports, whether somebody saw him with the key or somebody believed he had a key or some employee left the door unlocked and said, gee, I always lock the door. Somebody came in here, had to have a key. We don't know any of that.

But we do know this: We do know that the police report in that case says we want a complaint for B & E. And I've

provided authority to the Court that there is no offense of B & E in the state of Massachusetts. There is no offense of B & E unaccompanied by an intent to commit a larceny or some other offense inside of the place that's being entered.

So, here we have a perfectly contestable case, a case that could have had a plea, in which there is no admission whatsoever to the intent to commit a felony inside—once [29] you're inside. And that could easily have happened. And, in fact, we had a conviction—

THE COURT: Well, why would he have pled to the generic crime?

MS. THOMPSON: For the same reason everybody pleads; to get it over with.

You say, "Did you go in there, Mr. Shepard?" "Yeah, I did."

"So, you actually went in. Okay, you went in. Fine. There's a factual basis. I accept."

Which is why I attached Judge Hodos's opinion, just as an example of a conscientious district court judge who lacked the factual basis to support a guilty plea. It was constitutionally invalid. If you took a plea to breaking and entering without anybody saying that they had an into to—they'd have it beat.

We have not contested the validity of these convictions. We know we can't do that. We're not allowed to do that under Custis. So, all of those convictions, all 39 points under the criminal history, were counted.

The fact of a conviction is not what's at contest here. And I think that's where we're getting lost. It's not the fact of the conviction that's being contested. It is the meaning of the conviction. And the meaning is different than the fact of it. What it was really, too.

[30] So, to the nonexhaustive list that Judge Lipez has here I think the Court should ad the inquiry, did the defendant admit to facts and elements constituting the offense, because that's the Taylor inquiry. Is there really an admission by the defendant. And that's an inquiry: Does this police report indicate that Mr. Shepard did, in fact, admit to the facts and elements constituting the generically violent crime?

I think it's really entirely unfair for the defendant to be charged with the absence of a record, whether he's attacking the conviction or the government is attacking the conviction. Mr. Shepard is not coming in here and saying, please don't count these convictions against me in my criminal history because, you know, take my word for it, they were invalid. I can't produce a transcript. The burden is on the government. Let the government come in and prove without a transcript that these were valid pleas. Mr. Shepard has not done that. All right?

The government has said, let Mr. Shepard prove that these were not valid pleas, and sorry that we waited so long to bring this up. One of these was a 1994 conviction that the government is claiming they—as I complained about at the time we were litigating this case, coming up to the trial, and you said to me, Judge, so, they waited three years to indict him. What's your complaint? Here's my complaint. That was one year after that plea. If they were interested—after the [31] state court plea in 1994. There was a 1994 plea.

If this case had been brought in 1995, when it happened, that record would have been available to the government. The government waited three years to bring this, and now they're complaining that the record is gone. That's not Mr. Shepard's fault. Mr. Shepard is not the one in here complaining that the Court doesn't have a record, and, therefore, his conviction should be treated as invalid. The government is in here complaining that there isn't a record, and that really is the government's problem.

Mr. Shepard has come in here and he has faced the Court, he has dealt with the 39 criminal history points. The Court enhances his sentence because of those 39 criminal history points. When the question was not what's the meaning of this question, but is there a conviction. Okay?

There was a conviction. The meaning of the conviction is an entirely different inquiry. And I think that that's one that Taylor clearly forecloses. And even though it was not brought to the Court's attention or, I believe, to the attention of the First Circuit, immediately following the Taylor decision there was the Payton case out of the Eighth Circuit.

The Payton case was a case in which the district court, in trying to decide whether or not to enhance Mr. Payton's sentence, looked at the police reports. Okay? [32] And they said, yup, you did the bad things. The police reports make it clear. And we're going to enhance your sentence.

So, the Eighth Circuit affirmed that sentence enhancement. The Supreme Court granted certiorari, remanded for re-consideration in light of Taylor. And the Eighth Circuit said, we clearly are wrong. You cannot consider police reports. That was within a year of Taylor being decided, Payton against United States.

So, there is a circuit court that has looked at this.

And the Supreme Court looked at it, saw there's police reports, we're going to send this back to you, you look at this in light of Taylor. And the circuit said, no, Taylor doesn't allow you to look at police reports. That was Payton against United States.

THE COURT: The First Circuit has obviously taken a different position than that.

MS. THOMPSON: I think they have obviously taken a different position. But, you know, I don't think that the—

THE COURT: And the question is whether or not the police report referenced here is—I look at the police reports, from which I then draw conclusions about what must have been going on at the plea, or do I look at the police report and ask the question whether the police report was part of the plea colloquy. If it's the latter question, then the question is who has the burden. If it's the former question, [33] it's a different one.

MS. THOMPSON: Well, I think that a fair question is put here. Did the court taking the guilty plea have before it the police reports?

Now, having before it means, to me, I would think, it's relevant in that proceeding. That it's in that proceeding, not just in the file. And that question can be answered on the state of the evidence we have now. The state of the evidence fails to establish that there was any reference to the police report anywhere by the Court taking the guilty plea.

Now, I have seen the extremes and the hustle that defense lawyers put into trying to challenge guilty pleas. Anything that you can come up with. Go to the judge, Judge, did you always or did you never do this?

And the judge will say, I don't remember. You know, I'm retired now. But what's the difference to you? And, you know, anything to try to establish that your client should not be saddled with that conviction.

I want to point out to the Court that Mr. Shepard hasn't done that. Mr. Shepard has said these—I'm not contesting the validity, and the mere—the fact of conviction is what we are dealing with. The fact of conviction is not being contested.

And that's where I think Apprendi comes in. Because [34] Apprendi does talk simply about the fact of conviction. And so does Custis. And so does Daniels. And those cases say—

in fact, I was looking at Custis. I think that Custis—that the Supreme Court has basically said in Taylor, in Custis and in Daniels, district courts do not relitigate what happened in state courts. They don't do that. They don't look at that. It's not because we want to hurt the defendant. It's not because we want to hurt the government. That's not what district courts do.

And, in fact, in the Custis case, citing with authority to the—what was this, the Tenth Circuit—said, "Federal courts are not forums in which to relitigate state trials." That's just a quote out of there.

Now, what we are saying here is Mr. Shepard can't do that, but the government can. The government can come in here and say to the Court, oh, we want to find out what Mr. Shepard really did. What did he really do?

I don't think Custis lets do you that, I don't think Daniels let you do that, and I don't think Taylor lets you do that. And I think those three lines of cases are very consistent with each other. You just don't do that.

Now, if you look at this police report, you look at these police reports, I think you cannot be satisfied by looking at the police reports that those are things that Mr. Shepard admitted to, what's contained in the police [35] reports. And unless Mr. Shepard admitted to those things, they are not usable to enhance his sentence under Taylor, because Taylor requires that either a jury found it or the defendant admitted to the facts and elements constituting the generically violent crime. And in Taylor, in the footnote, the Supreme Court recognizes that there's going to be a lot of times—in footnote 10—that you just can't get there this way. You can't enhance it as an ACC.

And they say, "Even if the enhancement is not available under 924(e), the government may still present evidence of the defendant's actual prior conduct to increase his sentence

for the 922(g)(1) violation or the federal sentencing guidelines.

So, the Court realizes that, you know, you're going to come up against this kind of thing. They talk about, in Taylor, Custis and Daniels, old convictions, where it's hard to know, where regularity may not be followed. But to have saddled Mr. Shepard with the absence of the record of the colloquy, whether he challenges it or whether the government challenges, just seems to me to be entirely unfair, an unfair thing to do.

[36] This Court is entitled, and there is nothing in the opinion of Judge Lipez that suggests that this Court is not entitled to say to the government, you know, the proof I want is the colloquy. That's what I want to see. I want to see [37] what Mr. Shepard admitted to, since all we have here is a generic plea.

You know, the government knows, and I know that a judge could very well look to Mr. Shepard and say, Mr. Shepard, did you break and enter a vessel, a building, or a vehicle or a ship belonging to Jerry Cothran. All right? And that would not be an admission to the necessary element. It would just be, you know, let's go ahead, I want my concurrent sentence, I want my probation, whatever it is. And it happens every day. So, the absence of a plea colloquy, the absence of a record, the thing we all depend upon, what we all our whole lives try to create, the Court and counsel, the record. The absence of a record in an inquiry like this seems to me to just be absolutely an incredible deficit for the Court to have to overcome. And to shift the burden to Mr. Shepard, who is not a lawyer, who is not trained in the law, to tell us all what happened at the plea, seems to me not something that the First Circuit could have had in mind.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

January 11, 2002

Criminal No. 98-10185-NG

UNITED STATES OF AMERICA,

v.

REGINALD SHEPARD.
Boston, Massachusetts

TRANSCRIPT OF RESENTENCING PROCEEDINGS
BEFORE HON. NANCY GERTNER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	NADINE PELLEGRINI Assistant United States Attorney District of Massachusetts
For the Defendant:	LINDA J. THOMPSON, ESQ. Jacobson & Thompson, P.C. 1331 Main Street Springfield, MA 01103
U.S. Court Reporter:	HAROLD M. HAGOPIAN, RDR, CRR

Proceedings recorded by stenotype with
computer-aided transcription.

* * * *

[3] Mr. Shepard did file an affidavit with the Court. There was no affidavit filed by the government regarding its investigation or what might have taken place at Mr. Shepard's plea. And I think that that is significant because the Duano

[4] court does point out that that is something that the government might do to enlighten the Court. And the First Circuit points out that this Court also has the authority and the right to call for plea transcripts and colloquies to enlighten it about what happened at Mr. Shepard's plea hearing.

Then the thing that finally caught my attention regarding the Taylor case was that when Taylor spoke of the narrow range of cases in which the government—the government and the Court might look beyond the statute and the charging document, one of the things that it pointed out was that those cases would involve a situation in which the charging document charged only a burglary of a building, and did not charge anything else.

In this case, I believe that the best that the government has been able to show is that these police reports may have accompanied a request for a complaint to issue. These police reports, however, did not result in a complaint issuing which charged only the entry of a building.

These complaints—

THE COURT: The government—how—has the government established that the police report accompanied the complaint?

MS. THOMPSON: I—that's the thing they can establish, is that it was a request for the complaint. It's an application for the complaint.

[5] THE COURT: Okay.

MS. THOMPSON: Not that it accompanied the complaint, itself.

THE COURT: Okay.

MS. THOMPSON: But that it accompanied an application for a complaint.

With regard to the question of whether these documents were before the Court in a meaningful sense, to me, that means that they were something that the Court would rely on at the time of taking the plea. If it was before the Court that took the plea. Not merely in the file, the Court file, but actually before the Court that took the plea. That is, considered by the Court that took the plea.

There is no evidence whatsoever that these documents were considered by the Court that took the plea.

It would have been possible for the government to come forward with even affidavits regarding standard practice. It was my standard practice as a prosecutor to read the police report.

THE COURT: Uh-huh.

MS. THOMPSON: It was my standard practice as a district court judge accepting a plea to ask the prosecutor to read the police report.

There is no such evidence. There are no such affidavits before this Court indicating what function, if any, [6] the police reports had and illuminating the plea proceeding.

However, Mr. Shepard has done something that the Court—the First Circuit suggested he might do, which was Mr. Shepard might offer an account of what took place at his plea hearing, including documents before the judge. And Mr. Shepard did offer such an account, although it was that these documents were not part of the plea hearing that he was involved in, that is, the documents being the police report.

So I think that over all, when you look at the government's burden, the fact that the government seems to have faulted the defense here for not being able to come up with something more, with transcripts or other documents that were before the judge that accepted the plea. This is a case in which, as the United States Supreme Court said in the case of Mr. Urthy

(phonetic spelling) Daniels against the United States, that this is the kind of situation where, without the record below, it is futile -- I believe that that is the word that the Court used—it would be an almost futile exercise for a district court, meaning a federal district court, to attempt to determine accurately what was communicated to the petitioner in that case, more than two decades ago; but, in this case, some substantial amount of time ago.

The way I see Custis and Daniels entering into this proceeding is basically Custis and Daniels, as opposed to Taylor, which was focused on enhancement—Custis and Daniels [7] basically say this is not a function that is appropriate for the federal district court to be engaging in, is what is—what—trying to figure out what happened years ago in a state court proceeding. And that is why petitioners have been remitted to state court in order to challenge their convictions.

So that Mr. Shepard clearly can't come into this court and challenge his conviction. He has not done so. But, basically, what has happened is that the government has come in and made a challenge to the record.

The records which, under the plain language of Taylor, does not charge the kind of crime that could even be—that would call for you to go beyond the face of the documents, since it doesn't just charge entry of a building. Anything could have been the plea here, and it's our suggestion to the Court that the police reports in this case do not sufficiently illuminate the plea to make them reliable.

THE COURT: Okay. Thank you.

* * * *

[23] MS. PELLEGRINI: Just for clarification, so the government can determine its—the government does, of course, object to the Court's decision to resentence Mr. Shepard without the imposition of the armed career criminal statute.

There are eight convictions which the government has provided information about. I believe there are several others within the PSR. Is the Court saying that none of those convictions can the Court determine, based upon the information that it has been provided either through the PSR or through the government's submission, that the Court cannot determine that any of those crimes are, in fact, crimes of violence?

THE COURT: Let me ask you a couple questions, then. Do you have the plea colloquies with respect to any of them?

[24] MS. PELLEGRINI: No. The Court has everything that I have been able to obtain from the state court.

THE COURT: Is there any indication that the police reports that were provided—the incident/arrest reports that were provided were made part of the record during the plea colloquy?

MS. PELLEGRINI: I have no indication of what the plea colloquy determined or what documents were cited at the plea colloquy. All I have to determine what Mr. Shepard pled to are the factual statements either in criminal complaints or incident reports to help the Court determine which part of the burglary statute Mr. Shepard pled to.

And I guess my question to the Court is, is the Court saying—and I guess it is—that the defendant, by stating in an affidavit unvaryingly—the language does not vary—but simply, I did not state this, this was not read to me, that that is, in fact, reliable credible evidence, as opposed to the certified documents that we did obtain from the state court that relate to the charges that Mr. Shepard pled to?

THE COURT: The certified documents appropriately describe the police investigation and the police charges, and I don't doubt that they accurately summarize the police investigation and the police charges.

The inquiry before me is what Mr. Shepard pled to. And those police reports don't tell me what he pled to.

[25] MS. PELLEGRINI: So that if the—

THE COURT: His affidavit indicated that the police reports were never part of any plea colloquy in any of these cases. So the nuances of those reports—nuances that could spell 15 years for this man—were never addressed in the plea proceedings, never litigated, never described. He was never given an opportunity to say I agree with this, I disagree with that. And he is not now agreeing that that is what he pled to. And in a statute that tells me that consequences are triggered by convictions, I believe I have no choice.

So, yes, with respect to—if his affidavit addresses each of the charges that are at issue here, and tells me that—gives me the answer to the question what did he plead to, and the answer is he pled to the generic statute and not the police report, I don't believe I have a choice. As I said, to do otherwise—

MS. PELLEGRINI: Your Honor—I'm sorry.

THE COURT: And the next defendant will come here and say, that's not what I did. And then we have a trial in the United States District Court concerning what happened in Dorchester in, you know, 1995.

MS. PELLEGRINI: I'm sorry, your Honor, but is the Court saying that this affidavit provides to the Court that Mr. Shepard is saying I pled guilty to the nonviolent portion of that generic statute?

[26] THE COURT: No, no, I'm taking it at its word. It sees here, for example—where is it now—the judge did not read this incident report to me, didn't ask me whether the information—reading from paragraph 2—contained in the incident report was true. I did not admit the truth of the information contained in the incident report as part of my

plea, and I have never admitted in court that the facts alleged in this report are true.

And since you bear the burden of proving what he pled to, then you have not met that burden by showing to me a police report that was part of the application process.

That's my ruling.

MS. PELLEGRINI: That is your ruling.

THE COURT: Okay.

MS. PELLEGRINI: Fine.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 98-10262-NG

UNITED STATES OF AMERICA

v.

REGINALD SHEPARD

Attorney: LINDA J. THOMPSON

AMENDED JUDGMENT IN A CRIMINAL CASE

Note: The original sentence imposed on 7/14/99 was re-imposed for the reasons outlined in the attached memorandum and order.

X The Defendant Pleaded guilty to count(s): 1

Accordingly, the defendant is adjudged guilty of such count(s), which involved the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Counts
18:922(g)	Felon in Possession of a Firearm	10/95	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall pay a special assessment of $50.00 for count(s) 1 which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs and special assessment imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 021-54-8744

Defendant's Date of Birth: 4/21/62

Defendant's Mailing Address: none

Defendant's Residence Address: Wyatt Detention Center
Central Falls, RI

1/11/02 (Re-Sentenced)
Date of Imposition

/s/ _____
U.S. District Judge
Dated: 1/23/02

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 46 MONTHS ON COUNT 1.

X The Court makes the following recommendations to the Bureau of Prisons:

1. THAT THE DEFENDANT PARTICIPATE IN AN 500 HOUR COMPREHENSIVE DRUG TREATMENT PROGRAM.

X The defendant is remanded to the custody of the United States Marshal.

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on_____TO_____

AT_____with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

BY:_____

Deputy U. S. Marshal

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the bureau of prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the Probation officer.

__ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (check if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (check if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the schedule of payments set forth in the criminal monetary penalties section of this judgment,

The defendant shall comply with the standard conditions that have been adopted by this court (set farther below). The defendant shall also comply with the additional conditions on the attached page (if indicated below)

X see special conditions page 3.01

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without permission of the court or probation officer;

2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer,

4. the defendant shall support his or her dependents and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

SPECIAL CONDITIONS OF SUPERVISED RELEASE
(check all that apply)

X The defendant is prohibited from *possessing a firearm* or other dangerous weapon.

— The defendant is to pay the balance of the *restitution* according to a court ordered repayment schedule.

— The defendant is to pay the balance of the *fine* according to a court ordered repayment schedule.

— The defendant is prohibited from *incurring new credit* charges or opening additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the payment schedule.

— The defendant is to provide the probation officer access to any requested financial information.

— The defendant is to serve __ months in home detention, *(either)* with electronic monitoring and pay a fee of $4.97 for each day under electronic monitoring.

— The defendant is to reside for a period of __ months in a community corrections center and shall observe the rules of that facility.

X The defendant is to participate in a program for *substance abuse* as directed by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to the use of alcohol or drugs.

X The defendant is to participate in a *mental health* program as directed by the United States Probation Office.

X The defendant is to participate in a *Certified Batterer's Intervention Program*, as directed by the Probation Office.

— The defendant is to complete __ hours of *community service* at an agency approved by the probation officer.

— The defendant is to meet with the *Internal Revenue Service* within the first __ days of the period of supervision in order to determine the prior tax liability and is to file tax returns and pay any future taxes due.

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

STATEMENT OF REASONS

— The court adopts the factual findings and guideline Application in the presentence report.

OR

X The court adopts the factual findings and guideline application in the presentence report except: (see attachment if necessary): COURT DEPARTED UPWARD BASED ON ADEQUACY OF CRIMINAL RECORD. 4A1.3

Guideline Range Determined by the Court:

Total Offense Level:	12
Criminal History Category:	VI
Imprisonment Range:	30 to 37 MONTHS
Supervised Release:	2 to 3 YEARS
Fine Range:	$3.000, to $30.000.

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Total Amount of Restitution: N/A

N/A Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d)

N/A For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of title 18, restitution is

not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

N/A Partial restitution is ordered for the following reason(s):

— The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

— The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

X The sentence departs from the guideline range

— upon motion of the government, as a result of defendant's substantial assistance.

X for the following reason(s):

4A1.3 ADEQUACY OF CRIMINAL HISTORY CATEGORY. SEE MEMORANDUM AND ORDER.

UNITED STATES DISTRICT COURT
D. MASSACHUSETTS

[Filed Jan. 23, 2002]

No. CRIM. 98-10262-NG

UNITED STATES OF AMERICA,

v.

REGINALD SHEPARD,

Defendant.

MEMORANDUM RE: RE-SENTENCING

GERTNER, *District Judge*.

On July 14, 1999, I sentenced Reginald Shepard to 46 months in prison after he pled guilty to a violation of 18 U.S.C. § 922(g) (felon in possession of a firearm).[1] With a criminal history of VI, the presentence report ("PSR") calculated Mr. Shepard's sentencing guideline range to be 30 to 37 months.

The government moved for two enhancements: First, it sought an enhancement to a 15 year mandatory minimum term under the Armed Career Criminal Act ("ACCA") 18 U.S.C. § 924(e) *16 ("§ 924(e)").[2] I rejected that

[1] Under 18 U.S.C. § 922(g)(1) ("§ 922(g)(1)"), it is unlawful for a person who has been convicted previously of a felony to possess a firearm.

[2] A defendant convicted for a violation of § 922(g)(1) is subject to the sentence-enhancement provision at issue, § 924(e):

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court ... for a violent felony or a serious drug offense, or both ... such person shall be fined not more than $25,000 and imprisoned not less than fifteen years. . . .
>
> (2) As used in this subsection—. . .
>
> (B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

enhancement on the grounds that Mr. Shepard's conviction history did not meet the statutory requirements. I concluded that on the record before me, I could not determine that he had at least "three prior convictions . . . for a violent felony or serious drug offense" within the meaning of the statute. 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4.

Shepard was charged with the crime of breaking and entering under Mass. Gen. L. Ch. 266 § 16, which outlines a generic breaking and entering offense, including offenses that qualify as predicate convictions under the ACCA, *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), namely, breaking and entering into a building, and offenses that do not, namely breaking and entering a car or vessel. While police reports attached to the applications for state criminal complaints suggested that at least five of Mr. Shepard's convictions involved a building, those details were not reflected in the complaints themselves. Rather, the complaints tracked the boilerplate language of the statute. Mr. Shepard pled guilty to the complaints.

After ruling against applying the ACCA enhancement, I invited the government to move for an upward departure on the ground that the criminal history score of VI did not adequately reflect the seriousness of Mr. Shepard's criminal history. Since it was clear that Mr. Shepard's record justified an upward departure, I granted the motion.

The sentence which I imposed represented a two level upward departure, from a level 12 base offense level to a level 14, with 46 months being the highest sentence available in the range. My reasons are recorded in *United States v. Shepard*, 125 F.Supp.2d 562 (2000) ("Shepard I").

The government appealed. The decision was then vacated and remanded in *United States v. Shepard*, 231 F.3d 56 (1st Cir.2000) ("*Shepard II*"). The First Circuit found that I had erred in two respects: First, Shepard I suggested that the trial court could never use police reports to determine the crime to which the defendant had pled (and therefore, the charge of which he was convicted). Second, *Shepard I* implied that in order for me to find that the defendant had admitted to the predicate offenses, at either the state plea colloquy or during the federal sentencing, the defendant had to admit to the offense explicitly ("in the sense of 'yes, I struck the victim in the face,'") *Shepard II*, 231 F.3d at 66.[3]

The court directed the consideration of police reports and complaint applications to determine if they "constituted sufficiently reliable evidence of the government and the defendant's shared belief that the defendant was pleading guilty to the unlawful entry of a building." *Shepard II*, 231 F.3d at 70. The court also directed a review of the defendant's submissions at sentencing to evaluate whether, under the

[3] It was not my intent in *Shepard I* to imply either position although the decision could be fairly read to suggest these interpretations. I noted repeatedly that the ACCA's emphasis on convictions reflects a concern that facts which determine ACCA status had to have been litigated and subjected to the formalities of the criminal justice process before a defendant's sentence can be dramatically increased. While I confess to overstatement, what I meant by "the formalities" of the criminal justice process was that the ACCA's focus was on what the defendant had pled to or been convicted of, and not what he had actually done. (I noted that what the *Taylor* court described as the "categorical" approach, I was calling "focusing on the formalities of the record." *Shepard I*, 125 F.Supp.2d at 568.)

circumstances, the defendant admitted that he had pled to the predicate offenses. *Id.* at 66.

At the first hearing on remand, I addressed two issues: First, what was the question to be answered on remand? Was it--what did Mr. Shepard plead to? Or, was it—what did Mr. Shepard do to provoke the charges? Both parties agreed that the answer was: What did Mr. Shepard *plead* to on those prior occasions? Second, with respect to that question, who bears the burden of proof? With some qualifications noted below, both parties agreed that the government bears the burden of proof.

I also considered on remand two types of questions raised by the court—those which related to whether the police report was made part of, referred to, or used in any way in the plea colloquy[4] and those which related to whether Mr. Shepard admitted that he had pled to the predicate offenses.[5]

After two hearings, myriad briefs, and additional submissions of the parties, I have evaluated the police reports and complaint applications as well as the defendant's affidavit. I

[4] The Court noted: ". . . [D]id the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct? Where did the police reports come from? What took place at Shepard's plea hearings? More specifically . . . did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime?" *Shepard II*, 231 F.3d at 68.

[5] The Court noted: "Shepard's objections to the government's police reports and complaint applications might focus, for example, on any inconsistencies or ambiguities in their description of the defendant's conduct, or any circumstances relating to the creation or reproduction of the documents, that affect their usefulness for determining whether Shepard and the government both believed that an entry into a building was at issue when he entered the guilty pleas." *Shepard II*, 231 F.3d at 69.

concluded that the police reports did not provide reliable evidence on the central question, what did the defendant plead to in the state court? There is no evidence that the defendant and the government "shared [the] belief" that Shepard was pleading guilty to the unlawful entry of a building. *Shepard II*, 231 F.3d at 66.

As I describe below in greater detail, there was no transcript of the state plea colloquy, no presentence report containing the police reports, and no written plea agreement. The only account of the plea process that I have comes from the defendant's affidavit. The government offered no other version—no account from the state prosecutor or any other participant, no recitation of whether it was "standard practice" of the judge to review the report in open court. The defendant indicated that the police reports were never read or mentioned at his plea colloquies. They were never made a part of the plea process at all, either by way of exhibit or orally.

Furthermore, Mr. Shepard points to instances in which the reports were vague or obviously based on hearsay. Apart from the state plea colloquy, nothing the defendant said at the instant sentencing hearing or in his various court submissions qualifies as an admission that he had in fact pled to the crime of breaking and entering into a building in state court.

While I could not conclude by a fair preponderance of the evidence that Mr. Shepard had pled to the qualifying crimes of violence, I reiterated my conclusion that an upward departure was appropriate. Mr. Shepard's criminal history score, I found, understated the seriousness of his record under U.S.S.G. § 4A1.3, p.s. As a result, I reimposed the original sentence.

I. FACTS

Mr. Shepard pled guilty to a number of state offenses; at least five have been cited by the government as predicate offenses to ACCA. In each case, the state complaints tracked the Massachusetts statute (Mass. Gen. L. Ch. 266 § 16, 18,)[6] a statute which includes breaking and entering into a building as well as breaking and entering into a ship, vessel or vehicle. Case law under the ACCA identifies only breaking and entering into a building or other structure with intent to commit a crime as a crime of violence under the ACCA. *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). In contrast, breaking and entering into a ship, vessel or vehicle is not a crime of violence under the ACCA. *Id.*

The government introduced certified copies of police reports related to four offenses. In some instances, these reports were made part of applications for complaints. Significantly, the complaints themselves did not reflect the

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[6] The relevant statutes provide:

Section 16:

> Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished by imprisonment in the state prison for not more than twenty years, or in a house of correction for not more than two and one half years.

Mass. Gen. L. Ch. 266 § 16 (2000).

Section 18:

> Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years.

Mass. Gen. L. Ch. 266 § 18 (2000). The statute was amended in November 1989 to include the "or motor vehicle" language.

information contained in the reports on the issues relevant to this case; in each case, the complaints just tracked the boilerplate language of the statute.[7]

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[7] The reports were as follows:

(1) *May 1989 Boston Police Report (paragraphs 58, 59 of the PSR)*:

> Responded to R.C. [radio call] to 30 Harlem St. for B & E in progress. On arrival observed cellar door in rear had been broken down. Spoke to victim who [said] she heard noises downstairs. She then observed suspect described above in her pantry.
>
> Consistent with the police report, the complaint *application* states that the defendant was charged with "breaking and entering night" and that the property stolen or destroyed was a "cellar door." But the *complaint* itself says only that, on 5/6/89, the "defendant did break and enter in the night time, the building, ship, vessel or vehicle, the property of Jerry Cothran, with intent to commit a felony therein."

(2) *March 1991 Watertown Police Report (paragraphs 68, 69 of the PSR)*:

> In reference to . . . a B & E & L from the FRETTERS store . . . reported on 3- 11-91 the following is submitted: A follow-up investigation revealed that while the manager . . . and the assistant Manager . . . were in the back-room to the above buisness [sic] . . . they observed the back door open and observed a former employee, Reginal [sic] Shepard . . . enter the room. Upon seeing the two managers, the suspect Shepard ran from the room in a northerly direction out the parking lot towards Arsenal street . . . According to both employee's [sic] this door was locked and the only way in was with a key which they suspect Shepard had in his possession.
>
> After the incident, the managers did an inventory and found certain equipment missing.
>
> The complaint states that on 3/11/91, the defendant did break and enter in the night time, the building, ship, vessel or vehicle, the property of Fretters, with intent to commit a felony therein.

(3) *July 1991 The Boston Police Report (paragraphs 70-71of the PSR)*:

> Officers . . . responded to a radio call for an S/P wearing red shorts and blue shirt in the hallway of 258 Norwell Street. Upon arrival observed S/P (described above) walking away from above address . . . carrying a pink pillowcase . . . found pillowcase to contain property listed above . . . Officers checked bldg and found a panel on 3d floor front door had been broken in exposing inside door lock. When the officers entered the living room, they 'observed, in living room, areas where V.C.R. and phone were taken from' . . . also observed in bedroom one pink pillowcase missing from pillow.
>
> The complaint *application* states the defendant is charged with "b/e daytime" and the place is "258 Norwell St." The *complaint*, however, states that on 7/18/91, "the defendant did break and enter in the day time the building, ship or vessel of Monica Collins with intent to commit a felony therein."

(4) *February 1994 Boston Police Report (paragraphs 70-77 of the PSR)*:

> [R]esponded to R/C [radio call] for a black male going door to door asking for an unk. person . . . [Witness said suspect] went next door to # 145 Gallivan and was observed by the witness attempting to gain entry by turning several door knobs . . . [O]fficer . . . went to the rear of the property and suspect was observed with both arms through the glass partition (Glass to door was shattered) attempting to gain entry to the second door (near basement.)
>
> The complaint application charges the defendant with "breaking and entering," and "wilful malicious destruction of personal property," at 145 Gallivan Blvd. The complaint stated, "on 2/3/94 the defendant did break and enter in the day time, the building, ship or motor vehicle or vessel of Russell McGaugh with intent to commit a felony therein."

(5) *April 1989 (Paragraphs 53-55 of the PSR)*: The complaint application suggested that the defendant broke into the Crispus Attucks Children's Center by breaking a window and did put the Director the Center in fear and did take baby food, and certain equipment.

> The complaint however, states that on 4/2/89, "the defendant did break and enter in the daytime, the building, ship, or vessel of Crispus Attucks Children's Center with intent to commit a felony therein."

Mr. Shepard filed an affidavit on remand.[8] His affidavit focused on each of the police reports, which he reviewed one by one. He indicated that none of the details in these reports were ever mentioned at his pleas. Moreover, he indicated that the reports themselves were never read by the judge to him during the plea colloquy; nor was he ever asked if the information contained in the Incident Reports were true. He noted further that parts of the reports were ambiguous and based on hearsay.[9] He added with respect to each report: "I did not admit the truth of the information contained in the Incident Report as part of my plea and I have never admitted in court the facts alleged in the report are true."

No transcript of the plea colloquy was offered for any of the pleas cited by the government. The government represented that none was available. Likewise, no one offered any presentence reports which might have contained a police report or written plea agreements. There was no evidence suggesting that the police reports had ever been made part of the plea colloquy, in writing or orally.[10]

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[8] At the initial sentencing, the defendant objected to the "recitation of alleged factual information drawn from sources such as police reports and complaint applications," citing *Taylor*. On remand he submitted an affidavit, described above.

[9] With respect to the Watertown report, Shepard notes that part of the report is based on the hearsay statements of two employees (that a certain door was locked and "the only way in was with a key they suspect Shepard has in his possession", and that they "believe" upon Shepard's termination he "never turned his stores keys into [sic] the manager.") The employees did not see Shepard take anything; it was only after an inventory that they realized certain things were missing.

[10] A word about plea colloquies in the courts of Massachusetts: The defendant pleads guilty and is usually sentenced immediately. A presentence report is made available only if either party moves for it. See *Mass. R.Crim. P. 12*. There are rarely written plea agreements.

Apart from Mr. Shepard, no witness described what had occurred at the plea colloquy—no police officers, prosecutors or attorneys. In short, no document was offered rebutting Mr. Shepard's account of what went on.[11]

II. ANALYSIS

A. The Question to Be Answered on Remand Is: What Did Mr. Shepard Plead To?

The question on remand, and indeed, the central question under the ACCA is: What did Mr. Shepard plead to? As the First Circuit noted, the question is "not what Shepard did to provoke the criminal charges to which he pled guilty." *Shepard II*, 231 F.3d at 68.[12]

I will briefly review the ACCA case law and statutory language for two purposes—to put the government's arguments in context and to demonstrate the ways in which the

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[11] In *Commonwealth v. Quinones*, 414 Mass. 423, 608 N.E.2d 724 (1993) for example, a defendant filed a motion to withdraw his plea on the grounds that it was not a knowing and voluntary waiver of his constitutional rights. No transcript of the earlier plea colloquy was available. The vehicle containing the stenographic notes of the court reporter had been stolen. The trial judge denied the motion based on his "practice" in taking and accepting pleas of guilty and his "memory" of the proceedings. *Id.* at 424, 608 N.E.2d 724. The Supreme Judicial Court of Massachusetts affirmed on the ground that "[i]f the record is unavailable, it may be reconstructed through testimony or other suitable proof of what happened in court when the guilty plea was taken." *Id.* at 432, 608 N.E.2d 724.

[12] The First Circuit's question mirrors that of the Supreme Court in *Taylor*. The question in *Taylor* was, "whether, in the case of a defendant who has been convicted under a nongeneric—burglary statute [e.g. one that includes places, such as automobiles and vending machines, other than buildings], the government may seek enhancement on the ground that he actually committed a generic burglary." *Taylor*, 495 U.S. at 599-600, 110 S.Ct. 2143 (emphasis added). The Court answered: "No." The categorical approach of *Taylor* looks to what the defendant was convicted of, not what he did.

government's approach would require me to do precisely what *Taylor* and its progeny forbid.

The ACCA imposes a mandatory sentence of at least fifteen years, and up to life imprisonment for illegal possession of a firearm, by anyone who has three prior convictions for violent felonies or serious drug offenses. The linchpin is the word "conviction." While some judges believed that the "mere" fact of three prior felonies, without more, was not enough to make a career criminal, and hesitated or even refused to send the defendant to jail on that score alone,[13] the language of the Act and its legislative history was clear: Judges applying the ACCA should confine their identification inquiry to the conviction record--the number, type and timing of prior convictions. See James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 Mich. L.Rev.1951, 1967 (1991) ("The ACCA contemplates an examination of the conviction record, and little else.") The Supreme Court reaffirmed this in *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990): "We think the only plausible interpretation of [the ACCA] is that . . . it generally requires the trial court to look only to the fact of conviction and that statutory definition of prior offense."[14] Calling the methodology the "categorical approach," 495 U.S. at 602, 110 S.Ct. 2143, the Court cautioned the judge against becoming embroiled in a "daunting" factual inquiry about what had actually happened at the time of the state offense,[15] particularly where the state offenses occurred some time ago. *Taylor*, 495 U.S. at 600, 110 S.Ct. 2143. The aim was only to look to the "charging documents," not "plunge into the details of a particular defendant's conduct." *Shepard II*, 231 F.3d 58, 65 (citing *United States v. Winter*, 22 F.3d 15, 19 (1st Cir.1994)).

[13] *See, United States v. Wicks*, 833 F.2d 192, 195 (9th Cir.1987), *cert. denied*, 488 U.S. 831, 109 S.Ct. 87, 102 L.Ed.2d 63(1988) (Pregerson, J., dissenting) ("I would . . . hold that something more than three convictions is required . . . Here, where two of the three convictions stemmed from burglaries that occurred on the same night, I would hold that [the ACCA] was not intended to, and therefore does not, apply."); *United States v. Balascsak*, 873 F.2d 673, 683-84 (3d Cir.1989) (Becker, J. concurring) (refusing to enhance the sentence unless the conviction history showed "the crimes (and the episodes of which they were a part) were truly separate").

[14] This focus on convictions and the statutory offense definitions under the ACCA is notably different from the methodology for determining criminal history departures under the chapter 4 of the Sentencing Guidelines. Recognizing the inadequacies of the criminal history scoring system, the Sentencing Commission encouraged departures in broad terms—where "reliable information" indicates that the criminal history category "significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." U.S.S.G. § 4A1.3, p.s. "Reliable evidence" can include prior sentences that were not counted in the score, as well as "prior similar adult criminal conduct not resulting in a criminal conviction." Id. Police reports may well be an important source of "reliable information" for such departures. As I noted in *United States v. Footman*, 66 F.Supp.2d 83, 93 (D.Mass.1999), *aff'd. United States v. Footman*, 215 F.3d 145 (1st Cir.2000), however, the "reliable information" of "prior similar conduct" raises serious problems of its own.

[15] Indeed, the legislative history reflects a concern about broadening the inquiry beyond the conviction record. While some believed a record of conviction might predict recidivism, other factors which a court might take into account were less clear. Hooper, *Bright Lines, Dark Deeds*, 89 Mich. L.Rev. at 1963-64.

Where, as here, the state statute to which the defendant pled guilty did not track the federal definitions under the ACCA, the court was obliged to dig further. Nevertheless, the First Circuit has been clear about the limitations of "the dig": The judge may not hold a mini-trial on the particular facts underlying the prior offense, but he or she may "peek beneath the coverlet" of the formal language to ascertain whether the conviction was for a non-violent or a violent crime. *Dueno*, 171 F.3d 3, 5 (1st Cir.1999).

C. *The Government Bears the Burden of Proving What Mr. Shepard Pled To*

Plainly, the government bears the burden of "proving the applicability of an upward adjustment under the guidelines [or the ACCA]," *Shepard II*, 231 F.3d at 69 (citing *United States v. Dueno*, 171 F.3d 3, 7 (1st Cir.1999)), and thus, reconstructing the record. If the record is ambiguous, if it does not allow me to say one way or the other what Mr. Shepard agreed to plead to, then the enhancement should not apply.

The court's "peek beneath the coverlet" could involve one of three scenarios. If the defendant was convicted after a trial, the court is permitted to consider the jury instructions to understand what the plea consisted of. *United States v. Damon*, 127 F.3d 139, 142 (1st Cir.1997). If a guilty plea, the court may review the plea colloquy. *Id.* Or the court may review the defendant's statements or pleadings to see if they comprise admissions that the prior pleas were pleas to the predicate ACCA offenses. *United States v. Harris*, 964 F.2d 1234, 1236-37 (1st Cir.1992).

In this case, in order to decide what Mr. Shepard has pled to I must look in two directions: a) reconstructing the plea colloquy, and b) determining whether the defendant's responses (or failures to respond) to the PSR and the police reports attached thereto amount to an admission of the facts recited in the documents.

B. *Reconstructing the Plea Colloquy*

1. *Relationship of Police Reports to the Plea Colloquy*

The government offered certified copies of the police reports; at least five of these pleas, it suggested, were pleas to a crime of violence, breaking into a building.

The First Circuit has called for careful consideration of those reports. To the question, "may a sentencing court consider certified copies of police reports and complaint

applications to determine whether a defendant pled guilty to three prior 'violent felonies' qualifying for sentence enhancement under the [ACCA]," *Shepard II*, 231 F.3d at 58, the answer was plainly, "yes."

But the reverse position, which the government seems to urge, is not appropriate—that certified police reports are *all* that is needed, without proof that they were part of the plea colloquy, that they were exhibits to the colloquy, part of a plea agreement, or referred to by the judge or the prosecutor as part of the factual basis for the plea.

To be sure, the police reports offered by the government were certified. But certification established only that the document was an accurate copy of the police report. It does not answer the question: What did the defendant plead to? *Shepard II*, 231 F.3d at 60 n. 2. Neither does the parties' concession that the police report accompanied the application for a complaint, which made it part of the charging documents. In order to have persuasive evidence of what Mr. Shepard plead to, the police reports must have had some tangible relationship to the plea colloquy. This conclusion is clear from the questions that the Court posed as examples of the kind of inquiries I should make on remand:

> A) Did the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct?
>
> B) What took place at Shepard's plea hearings?
>
> C) Did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime?

D) Where did the police reports come from?[16] *Shepard II*, 231 F.3d at 68.

2. *The Record: No Transcripts, State Presentence Reports, or Plea Agreements--Only Shepard's Affidavit*

A review of the plea colloquy would obviously enable me to reconstruct the plea and answer the relevant questions. If the police report had been offered as part of the plea, had been an exhibit to the plea colloquy, or had been orally recited as part of the factual basis of the plea, then I could conclude that Mr. Shepard adopted those facts.

The problem is that there is no record of the plea colloquy. There is no formal plea agreement (to which a police report might have been attached). There was no state presentence investigation which may have clarified the factual basis for this plea. There is no rebuttal offered by the government to Shepard's account of what went on during the plea colloquy.

The only account is Mr. Shepard's, and he insists that the police reports were never mentioned during his pleas. Mr. Shepard's affidavit states unequivocally that the police reports offered here were never made part of the plea colloquy, never explained to him, and never acknowledged by him to be accurate at that time or at any other.

[16] To be sure, this question, taken out of context as described below, might suggest that all the government has to do is prove that the report was an accurate copy of the original—i.e., certify the report. As I suggest throughout, that interpretation of *Shepard II* would be inconsistent with the categorical approach. The police reports have relevance only insofar as they were part of the plea process or a federal presentence report to which the defendant did not adequately object.

3. *The Government's Position Is Inconsistent with United States v. Harris,*[17] *United States v. Custis,*[18] *and United States v. Daniels.*[19]

Nevertheless, the government wants the Court to infer that Mr. Shepard pled guilty to the facts contained in the various reports. It suggests that if the police report recited certain facts, namely, what happened and where it happened, and the defendant did not specifically deny those facts, he "must have" pled guilty to them. Or, it implies, since the police report included those facts, it is reasonable for me to assume that everyone—defendant and government—"must have" shared the intent to plead guilty to them. How could Mr. Shepard have pled guilty to breaking and entering at all if he were not pleading to those facts, they suggest? What facts could he have reasonably contested?

These inferences are not only unwarranted in the record; they are troubling. Since I do not know the specifics of what Mr. Shepard actually did (in terms of the crime), or what the state of the evidence against him was, or what other information the officers had, or what he was in a position to contest, in order to adopt the government's position, I would have to speculate about critical issues.

To take the facts as admitted in the police report because the defendant never specifically denied them during the plea would turn the plea process on its head. Mr. Shepard was never *asked* to deny or accept the facts that are of relevance to this federal proceeding. All that I can tell from the record is that he pled to the boilerplate complaint, phrased in terms of

[17] 964 F.2d 1234 (1st Cir.1992).

[18] 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994).

[19] 532 U.S. 374, 121 S.Ct. 1578, 149 L.Ed.2d 590 (2001).

the general breaking and entering statute. As a matter of evidence law, this could hardly qualify as an admission.[20]

Indeed, the government's position is tantamount to placing the burden of proof on the defendant, and an extraordinary burden at that. He could dispel the inferences not by saying, "I did not plead to those details," as he has done, but only by saying, "I did not do this or that act as the police report says."[21]

Taylor expressly eschews such an approach—evaluating the actual course of conduct which triggered the criminal offense, making factual findings not necessarily ever made by the state court in federal court, and if the particular issues were not litigated in state court, litigating them in federal court. Indeed, the Court adopted the categorical approach even when it recognized the problem presented by the instant case--when a defendant pleads guilty but no record of the plea survived colloquy. *Taylor*, 495 U.S. at 601-02, 110 S.Ct. 2143.

Plea bargains affect guilty pleas that may or may not be on all fours with the charging documents; they are the product of strategic "bargains" after all, based on the sentence offered, the risks of trial, and the state of the evidence. As the Supreme Court noted, "In any case where the defendant pleaded guilty, there is often no record of the underlying

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[20] The only "admissions" category relevant here would be an "admission by silence." These admissions are admissible on the theory that a person would protest the statement made in his presence if untrue. M. Graham, 3 Handbook of Federal Evidence § 801.21 (5th ed.2001) (describing application of Fed.R.Civ.P. 801(d)(2)). Plainly, nothing that I know about Mr. Shepard's plea colloquy would justify such an inference.

[21] Even if I were to engage in the inquiry--the "must haves" that the government's analysis invites--I would conclude that these reports are sketchy, at best. With the sole exception of two of them (Watertown 1994, Boston 1991), they reproduce the hearsay accounts of witnesses on the scene.

facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, non-burglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." *Taylor*, 495 U.S. at 601-02, 110 S.Ct. 2143, cited approvingly in *Shepard II*, 231 F.3d at 69-70.

Other courts have confronted similar situations as the instant one and have rejected arguments similar to those made by the government. In *United States v. Shannon*, 110 F.3d 382 (7th Cir.1997), the defendant pled to statutory rape, which could include either consensual intercourse or forcible rape of a minor. While the complaint contained details consistent with the latter, the information to which the defendant pled alleged only statutory rape. The Ninth Circuit looked to the information, holding that "the information was the basis of the conviction and sentence and all its allegations were admitted and must be deemed established, while the complaint contains factual allegations that are contested and would require an evidentiary hearing to confirm." *Id.* at 384. Likewise, in the instant case, I am obliged to review only the indictment, and not the application for the complaint or police reports not made part of the record.

Or, in the case of a jury trial, if the jury instructions were lost, plainly the court is not authorized to review the transcript to determine what the trial "must have been" about or what the jury "must have" convicted the defendant of. The Supreme Court disapproved of such an approach in *Taylor*, 495 U.S. at 601, 110 S.Ct. 2143.

To be sure, a "*Taylor*-type" review of documents may include more than the charging document. *See e.g. United States v. Maness*, 23 F.3d 1006, 1009- 10 (6th Cir.), *cert. denied*, 513 U.S. 906, 115 S.Ct. 271, 130 L.Ed.2d 189 (1994) (reviewing transcript of guilty pleas and indictments to determine whether defendant actually committed generic burglary when he pled guilty to charges that contained all of

the elements of a generic burglary); *United States v. Rutherford*, 54 F.3d 370, 372 n. 4 (7th Cir.) *cert. denied*, 516 U.S. 924, 116 S.Ct. 323, 133 L.Ed.2d 224 (1995) ("If necessary to resolve an ambiguity in the charging document, the courts may also, in some circumstances, examine the presentence report, plea agreement, or factual findings of the sentencing court"); *United States v. Smith*, 10 F.3d 724, 733-34 (10th Cir.1993) (per curiam) (holding that "a court can look beyond the statutory count of conviction in order to resolve a patent ambiguity caused by a broad state statute"; however, the examination is limited to "the charging papers, judgment of conviction, plea agreement or other statement by the defendant for the record, presentence report adopted by the court, and findings by the sentencing judge.")

But the government has cited no case that suggested that a police report not made part of a plea colloquy, not reflected in the complaint or indictment, and not adopted by the defendant in the presentence report or at any other time can comprise "*Taylor*-type" evidence for the purpose of determining whether the underlying conviction was for a crime of violence.[22]

A final note: The First Circuit and the Supreme Court have been clear about limiting collateral attacks on convictions during federal sentencing proceedings. *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994) (holding that with the sole exception of convictions obtained

[22] I have found reference to the use of a police report as an independent piece of evidence, not as part of a formal proceeding or an admission in one case, *United States v. Richardson*, 230 F.3d 1297 (11th Cir.2000). In *Richardson*, the court found that a police report was reliable evidence to determine timing of offenses—to operationalize the statutory requirement that the three previous convictions be "committed on occasions different from one another" rather than be part of the same criminal episode. The issue in *Richardson*—the timing of offenses—is not easily determined by *Taylor's* categorical approach.

in violation of right to counsel, defendant in federal sentencing proceeding has no right to collaterally attack validity of previous state convictions used to enhance his sentence under the ACCA); *Daniels v. United States*, 532 U.S. 374, 121 S.Ct. 1578, 149 L.Ed.2d 590 (2001) (with the sole exception of convictions obtained in violation of right to counsel, motion to vacate, set aside, or correct sentence is not the appropriate vehicle for determining whether a conviction later used to enhance a federal sentence under ACCA was unconstitutionally obtained). If, on the one hand as in *Taylor*, a defendant is not allowed to look below the surface of the plea to demonstrate that he did not *really* threaten anyone, even though the crime to which he pled was an ACCA predicate, then surely the government cannot do the reverse. It cannot look below the surface of the plea to show that even though the plea was to the general offense of breaking and entering and even though nothing else apparently was discussed, what was *really* going on was a plea to a violent crime.

In conclusion, in answer to the specific remand questions: According to the defendant's affidavit and uncontradicted by any other evidence, the court taking the guilty plea did not have before it the police reports and complaint applications described in the PSR or any other documents describing the defendant's affidavit. At Mr. Shepard's plea hearing, no one mentioned the police reports or the details comprised therein. The defendant did not contest the facts in the police reports and complaint application because the issues never came up. The police reports apparently come from the application for the complaint. There is no indication that they were ever made part of the record of the plea colloquy.

The government has failed to meet its burden of proof with the submission of the police reports.

D. Did Shepard Admit That He Had Pled Guilty to a Crime of Violence Whether in the State Plea Colloquy or in this Proceeding?

Case law suggests that, in addition to trying to reconstruct the circumstances of the plea or the conviction, the government could establish what the defendant pled to through his or her admissions. *Dueno*, 171 F.3d at 6 (sentence defendant only for those specific "prior crimes of which he was convicted by a trier of fact or by his own admission.") But if the central question is—what did the defendant plead to? —then it follows that the relevant admission need be similarly focused—an admission with respect to the subject of his guilty pleas, and not admissions about whether the defendant committed the underlying crime. The inquiry is still plea-focused. It is not about whether the defendant did the underlying crime. *Shepard II*, 231 F.3d at 66 ("the court's determination about the meaning of the guilty plea can be made on the basis of sufficiently reliable evidence independent of a fact-specific admission. . . . *Harris* and *Dueno* leave open the question of what documents are sufficiently reliable evidence for determining whether a defendant's plea of guilty constitutes an admission to a generically violent crime") (emphasis added).

1. *Objecting to the Presentence Report*

The presentence report lists the defendant's convictions. Beneath each line describing the conviction, the probation officer typically includes a description of the offense from the police report. If the defendant did not object to that portion of the presentence report, presumably he or she would be admitting that the convictions as described in the PSR are accurate--not just the fact of the convictions, but their nature as well.

That is what occurred in *United States v. Harris*, 964 F.2d 1234 (1st Cir.1992). The Court characterized the holding in

Harris as concluding that the PSR was "a reliable source for establishing *whether the defendant pled guilty to a violent crime* because the basic facts alleged in the PSR—i.e., that the defendant perpetrated a violent assault--were 'uncontested and uncontradicted.'" *Shepard II*, 231 F.3d at 65 (emphasis added). Since the PSR was uncontradicted, it was reasonable to conclude that both defendant and the government believed that the plea amounted to a plea to the generically violent crime.

In *Dueno*, the court found that the trial court erroneously concluded that the predicate offense was the violent version, breaking and entering a building, rather than the non-violent version, breaking an entering a car or boat, when the complaint to which the defendant pled could comprise either. Rather than remanding the case for additional fact findings, the government urged the court just to look to the PSR, as it had done in *Harris*, since the defendant never objected to it. The PSR characterized the offense in question as the violent version, breaking and entering a building.

The court refused, unwilling to engraft a finding of that seriousness to Dueno's failure to object to the PSR, because Dueno's failure to object to the PSR's account, the court found, was not enough to "ground a finding that [he] pleaded guilty to breaking into and entering a building." *Shepard II*, 231 F.3d 66 (quoting from **Dueno**, 171 F.3d at 7). A remand was ordered, in which the court pointed out several issues that the trial court needed to resolve.

The court's language is telling. Two of the problems the court noted related to the record before the judge who accepted Dueno's state plea. The evidence "did not include 'a single document that was before the judge who accepted Dueno's plea,' [and] there was no account of what took place at Dueno's plea hearing." *Shepard II*, 231 F.3d at 66.

But the court also mentioned, and this is the point the government emphasizes, that a third problem with the *Dueno* record was that the PSR included facts that were taken from the police report, but the record did not include the report itself.

From that general suggestion on the *Dueno* remand, the government makes two arguments: First, *all* that the government needed to do in order to meet the requirements of the ACCA, and the First Circuit case law, was to produce the certified police report to supplement the PSR. Second, once the government does so, the burden then shifts to the defendant to show the ACCA enhancement does not apply.

The government has taken the police report discussion in *Dueno*, later repeated in *Shepard II*, out of context. A certified copy of the police report may show that the PSR accurately describes what the police said in the police report and application for a complaint, and may be taken as an admission to the predicate offense—*if there is no objection from the defendant. But if the defendant objects*, as here, the police report alone cannot be used to establish what the defendant pled to or comprise an admission to the predicate offense.

To be sure, the court in *Shepard II* faulted Mr. Shepard's initial objections. Plainly, "any objection posed by a defendant at the time of sentencing to the facts set forth in a PSR" is not enough to keep a court from finding that the guilty plea constituted an admission to those facts. *Shepard II*, 231 F.3d at 68. All that Mr. Shepard said in his initial objections was that any description of the convicted offenses, beyond the language of the charging documents, is inappropriate under the ACCA.

But Mr. Shepard elaborated on his objections during the resentencing proceedings. His affidavits focused on each of the police reports. He indicated that none of the details in these

reports were ever mentioned at his pleas. Moreover, he indicated that the reports themselves were never brought up. He noted further that parts were ambiguous and based on hearsay.

The government suggests that Mr. Shepard's additional affidavits are irrelevant at best, inadequate at worst. The only way the government can come to this conclusion is if it asked a different question—the very question which the United States Supreme Court and the First Circuit expressly do not ask. The only adequate response, according to the government, would be for the defendant to say—"I did not do the things described in the police report"—or else the facts of the report will be deemed admitted. Under this approach, it would not be enough for the defendant to say, as Mr. Shepard said here—"I did not plead to those facts because they were not brought up at my plea colloquy."

If what he actually did is the test, as the former response suggests, then this area of the law has come full circle. The defendant says: "I didn't do what the presentence report of convictions said I did" or "I did not do what the police report said I did." The government rebuts, and then I have a trial in my courtroom of state court offenses dating from years ago, the very "archeological dig" that the case law rejects.

Plainly, there are problems with the categorical approach; the enhancement does hinge on the "happenstance of state court record-keeping practices." *Shepard II*, 231 F.3d at 67. But that is unavoidable even if police reports, complaint applications, and other documents are considered. Defendants will always get a windfall when the police lose the police report or other underlying documentation. Any standard which, as in *Harris* and *Taylor*, seeks to reconstruct the record necessarily depends on the comprehensiveness of that record.

The Ninth Circuit had to address this in *United States v. Parker*, 5 F.3d 1322 (9th Cir.1993). Parker was found guilty of felon in possession of a firearm. The government sought to enhance under the ACCA, based in part on a 1968 conviction. The 1968 charging instrument noted that Parker and a co-defendant "enter[ed] a residence . . . with intent to commit theft therein," a violent felony under 18 U.S.C. § 924(e)(1). Parker, however, was convicted of the charge before a jury, but no jury instructions were available. The question was whether the court could look at the charging paper alone to determine the nature of the conviction when jury instructions were unavailable.

In a prior case, where the jury instructions were not available, the court held that the verdict form could be analyzed in connection with the charging paper. *United States v. Alvarez*, 972 F.2d 1000, 1005-1006 (9th Cir.1992) (where the charging instrument included allegations of the elements of generic "burglary" and the verdict stated that the jury found the defendant guilty "as charged in the information," there was enough evidence to establish that the conviction constituted burglary under section 924(e)).

But in *Parker*, the verdict form provided no information regarding the facts found by the jury. It merely referred to the statutory provision which had been phrased in generic terms. Thus, the court found that reliance on the "charging paper alone" to make the determination under the ACCA was not appropriate. *Parker*, 5 F.3d at 1327 And it added:

> Ultimately, whatever rule were adopted, someone—either criminal defendants or the government—would benefit from the loss or destruction of jury instructions. . . . Because we can assume that the problem of lost or destroyed instructions will affect primarily older convictions rather than recent ones, the rule we adopt is consistent with the general sentencing principle that he

> passage of time should dilute—and not magnify—the effect of past conduct on punishment for present acts.

Id. at 1328.

Surely the most reliable indicator of what the plea was about was the transcript and exhibits. But as the court noted, there are other ways of establishing the predicate offenses. A defendant may admit to the ACCA predicate or may be taken to have admitted to it through his failure to object to the PSR, as supplemented by a certified police record. The parties could reconstruct the plea through other means—the prosecutor's affidavit about what his usual practice was, the police officer who was present, etc.

But when a defendant denies that those police reports were part of the plea process and objects to probation's characterization of the offenses in the PSR, the government has to prove that there were predicate ACCA convictions. It has not done so here.

III. CONCLUSION

On this record, given this case law, I cannot conclude by a fair preponderance of the evidence that Reginald Shepard has been convicted of "at least" three crimes of violence under the ACCA.

Therefore, the original sentence I imposed on July 14, 1999 (46 months on Count I), was re-imposed on January 11, 2002, for the reasons stated above.

SO ORDERED.

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

No. 02-1216

UNITED STATES OF AMERICA,
Appellant,

v.

REGINALD SHEPARD,
Defendant, Appellee.

Heard Jan. 7, 2003
Decided Nov. 3, 2003

Rehearing and Suggestion for Rehearing En Banc

Before BOUDIN, *Chief Judge*, TORRUELLA and LIPEZ, *Circuit Judges*.

BOUDIN, *Chief Judge*.

Under the amended Armed Career Criminal Act ("the Act"), 18 U.S.C. § 924(e) (2000), a 15-year mandatory minimum sentence is required for anyone convicted as a felon in possession of a firearm who has three or more prior convictions for a "violent felony" or "serious drug offense." This appeal by the government concerns the proper application of these labels to Reginald Shepard"s prior guilty pleas under state burglary statutes. The issue is a recurring one.

On March 3, 1999, Shepard pled guilty to a charge of violating the federal statute prohibiting a felon from possessing a firearm, 18 U.S.C. § 922(g)(1) (2000). Shepard

had in fact sold a Glock 17, 9 mm pistol and ammunition to an undercover federal agent at South Station in Boston. Shepard already had on his record dozens of prior state convictions, including eleven for breaking and entering. The government sought to have Shepard sentenced as an armed career criminal, arguing that at least five of these breaking and entering convictions were violent felonies under the Act.

Under the Act, the phrase "violent felony" is not limited to crimes in which violence actually occurs; instead, the phrase is defined to include *inter alia* "any crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson or extortion . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). In *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), the Supreme Court held that Congress intended "burglary" to mean any crime under state law, however denominated, that incorporated the elements of what the Court described as "generic burglary"—unlawful entry into "a building or other structure, with intent to commit a crime." *Id.* at 598-99, 110 S.Ct. 2143.

At Shepard"s initial sentencing, the five convictions at issue were under one or the other of two Massachusetts statutes that forbid breaking and entering a "building," "ship," "vessel" or "vehicle" with intent to commit a felony.[1] In each of the state cases, the complaint merely charged Shepard in the boilerplate language of the statutes, leaving it unclear just what kind of structure Shepard had entered. Thus, the

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[1] One of the statutes says "motor vehicle" instead of "vehicle" but otherwise they are similar; the difference between them is that one statute, Mass. Gen. Laws ch. 266, § 16 (2000), is directed to breaking and entering by night and carries a 20 year maximum, while the other, ch. 266, § 18, has only a 10 year maximum and embraces breaking and entering during the day as well as non-forcible entry into a dwelling at night.

complaints alone did not reveal whether Shepard had broken into a building or some lesser enclosure such as a car or boat.

The "complaint" under Massachusetts procedure is the final step in the charging process, roughly equivalent to a federal information. 1 *Massachusetts Criminal Practice* § 4.1-4.2 (1998). Issued by a magistrate, the complaint is based on a complaint application normally filed by a police officer and likely to incorporate or be accompanied by a police report. *Id.* The application is customarily sworn and is automatically given to defendants at their arraignments. Mass. Gen. Laws ch. 276, § 22 (2000); Super. Ct. Standing Order 2-86; 1 *Massachusetts Criminal Practice* § 4.2, 16.5(C). Courts in Massachusetts can presume that defendants know the information contained in police reports. *See Commonwealth v. Brown*, 51 Mass.App.Ct. 702, 748 N.E.2d 972, 981 (2001).

Forewarned by an earlier decision of this court, *United States v. Dueno*, 171 F.3d 3 (1st Cir.1999), the government secured the state court files from Shepard"s earlier convictions, presented certified copies, and argued that the complaint applications and police reports contained in the state court files showed that Shepard"s prior convictions were for entries into *buildings* and so constituted generic burglaries under *Taylor*. Taking these documents at face value, they showed (with varying degrees of elaboration) the following as to the charges that had led to Shepard"s guilty pleas:

> May 1989. Break in at 30 Harlem St. in Boston; defendant discovered by an inhabitant in the pantry.
>
> March 1991. Entry into 550 Arsenal St in Watertown; defendant in back room of store.
>
> July 1991. Entry into 258 Norwell St. in Boston; defendant found in hallway with property taken from a broken-into apartment.

> February 1994. Attempted entry into 145 Gallivan Blvd; defendant found with arms through broken glass window.[2]

The district court ruled that the complaint applications and police reports could not be considered and declined to sentence Shepard under the Act, imposing instead a sentence of 46 months (which included a two-level upward departure). *United States v. Shepard*, 125 F.Supp.2d 562, 572 (D.Mass.2000) ("*Shepard I*"). On the government"s appeal, this court reversed, ruling that there was no "absolute bar" to consideration of police reports and complaint applications; the question, said the panel, was whether, in the contemporaneous understanding of the state and the defendant, Shepard had pled guilty in the breaking and entering cases to entry of a building (rather than, say, a motor vehicle). *United States v. Shepard*, 231 F.3d 56, 67 (1st Cir.2000) ("*Shepard II* "), *cert. denied* 534 U.S. 829, 122 S.Ct. 72, 151 L.Ed.2d 37 (2001).

On remand, the government filed additional complaint applications or police reports from state court files evidencing two additional convictions. According to these documents, one conviction was for a February 1981 break in to the Jamaica Plain High School gymnasium and the theft of property; the other was an attempted break in at 446 Shawmut Avenue where Shepard was found on the fire escape next to a window that had been pried open with a knife.

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[2] At the first sentencing hearing the government argued that Shepard"s conviction for an April 1989 break in to Crispus Attucks Children"s Center building should also be counted as generic burglary. Since the government did not provide the police reports or complaint applications for this conviction, only the PSR, it simplifies our analysis if we ignore this conviction for the present case.

Shepard submitted an affidavit saying essentially the same thing as to all of the alleged predicate charges:

> I am sure that, at the time of [the state court plea hearing], the judge did not read this Incident report to me and did not ask me whether or not the information contained in the incident report was true. I did not admit the truth of the information contained in the Incident report as part of my plea and I have never admitted in court that the facts alleged in the reports are true.

After these submissions, the district court imposed the same sentence as before. *United States v. Shepard*, 181 F.Supp.2d 14, 18 (D.Mass.2002) ("*Shepard III*"). The court emphasized Shepard"s affidavit denials that he had ever admitted in court the underlying facts of the crimes and concluded that "the police reports did not provide reliable evidence on the central question, what did the defendant plead to in the state court?" *Id.* at 17, 19-20. The government again appeals, arguing that complaint applications and police reports establish that Shepard pled guilty to breaking into buildings.

There is surely an air of make-believe about this case. No one, and this includes Shepard and the district court, has seriously disputed that Shepard *in fact* broke in to half a dozen or more buildings and was consequently convicted upon pleas of guilty under the two Massachusetts statutes in question. Further, his string of convictions—which the district court described as "an 18-year crime spree," *Shepard I*, 125 F.Supp.2d at 565—shows that he is just the kind of burglar whom Congress had in mind in adopting the tough 15 year minimum sentence for armed career criminals. *Taylor* recounts in numbing detail the legislative history showing Congress" aim to apply the Act to repeat burglars later convicted of a gun crime. *Taylor*, 495 U.S. at 581-90, 110 S.Ct. 2143.

Congress" rationale was that a large percentage of all crimes are committed by repeat offenders; that many of these crimes have at least a potential for violence (*e.g.*, the burglar who encounters a resident in the house being burgled); that after a series of these crimes, the defendant is fairly described as a repeat offender; and that when a repeat offender then also commits a federal gun crime, it is time for that felon to serve a long prescribed minimum sentence. *Taylor*, 495 U.S. at 581-88, 110 S.Ct. 2143. Whatever the force of the theory, there is no doubt that Congress intended that it be implemented.

Yet *Taylor*, while construing the term "burglary" broadly (based on common usage rather than common law), narrowed the Act dramatically in another respect. Partly for practical reasons of administration, *Taylor* forbade a *de novo* inquiry by the sentencing court into what *conduct* the defendant actually engaged in incident to the predicate offense, and focused instead on whether the *crime* of conviction was *necessarily* a generic burglary (or some other crime of violence). *Taylor,* 495 U.S. at 599-602, 110 S.Ct. 2143. Admittedly, this simplifies administration if the state statute describes generic burglary and nothing else.

The problem—which *Taylor* recognized and addressed—is that state burglary statutes are often drafted to embrace both conduct that does constitute generic burglary and conduct that does not (*e.g.*, building versus vehicle[3]). *Taylor*, 495 U.S. at

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[3] Breaking and entering a vehicle is not generic burglary under *Taylor's* definition. 495 U.S. at 598-99, 110 S.Ct. 2143. Our circuit has never squarely decided whether burglary of vehicles or boats might still be grounds for enhancement under the Act because they "involve [ ] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), although prior dicta have suggested that they do not qualify as violent felonies, *see, e.g., Shepard II*, 231 F.3d at 59. Since the parties do not dispute this point, we assume it for present purposes, reserving always the peculiar problems posed by houseboats and camper vans, *see United States v. Peterson*, 233 F.3d 101,

599-602, 110 S.Ct. 2143. *Taylor* makes clear that where (as here) the statute embraces two different crimes or categories of criminal conduct, the defendant will be deemed guilty of a violent felony if one of the two corresponds to generic burglary *and* that is the crime of conviction in the particular case. *Id.* at 602, 110 S.Ct. 2143.

But how can one tell whether generic burglary was the crime of conviction if one does not look at what actually happened at the scene of the crime? *Taylor* said that the sentencing court can still look at the charging papers and jury instructions, which together may well identify the crime of conviction. *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143. The Court did not explicitly rule out attention to other court-related documents or say just how guilty pleas should be parsed. Until the Supreme Court addresses the open issues, we must use our own reasoning, keeping faith with our own prior precedents.

Let us start with basics. Under *Taylor*, a burglary conviction by a jury would count as a crime of violence under the Act if the indictment and instructions made clear that the burglary was of a house. *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143. The same would be true if instead the defendant pled guilty to such indictment naming a house as the burgled location.[4] It would also be true, as this court held in *United*

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110 (1st Cir.2000); *United States v. Sweeten*, 933 F.2d 765, 770-72 (9th Cir.1991).

[4] All twelve circuits that have addressed the issue have agreed that *Taylor* analysis applies after a guilty plea, even though *Taylor* only explicitly explained how to resolve ambiguity when the prior convictions were obtained after jury trials. *See United States v. Adams*, 91 F.3d 114, 116 (11th Cir.1996), *cert. denied* 519 U.S. 1047, 117 S.Ct. 623, 136 L.Ed.2d 546 (1996) (collecting and joining decisions from the 1st, 5th, 6th, 7th, 8th, 9th, and 10th Circuits); *United States v. Hernandez*, 218 F.3d 272, 278 (3rd Cir.2000); *United States v. Hill*, 131 F.3d 1056, 1064 (D.C.Cir.1997) (applying parallel U.S.S.G. career criminal provision);

States v. Harris, 964 F.2d 1234 (1st Cir.1992), even if the indictment were silent as to the venue so long as the case files showed that the plea was to burglary of a house. *Id.* at 1236-37; *accord United States v. Coleman*, 158 F.3d 199, 202-03 (4th Cir.1998).

In *Harris*, Judge (now Justice) Breyer discussed the exact situation before us: a defendant who has pled guilty to violating a broadly worded statute that included both situations that would and situations that would arguably not be violent felonies. *Harris*, 964 F.2d at 1236-37. As with Shepard"s complaint, the indictment in *Harris* repeated the statutory boilerplate, leaving it unclear what category of offense was at issue. *Id.* The *Harris* court explained:

> In such a case, we believe it would be appropriate for the sentencing court to look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested (in this context) in the violent or non-violent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime ("building"), rather than the generically non-violent crime ("vehicle") was at issue.

Id. at 1236.

Judge Breyer then described the presentence report"s summary of the case files from Harris"s state convictions; these files (just like the complaint applications and police reports in Shepard"s case) made clear that the crimes were violent felonies—in *Harris*, that the defendant had twice physically assaulted the victim. *Harris*, 964 F.2d at 1236-37

United States v. Palmer, 68 F.3d 52, 59 (2nd Cir.1995); *United States v. Cook*, 26 F.3d 507, 509 & n. 5 (4th Cir.1994).

.On this basis alone, this court concluded that Harris's prior convictions were properly treated as violent felonies and (together with a third crime of violence) justified the 15 year minimum sentence prescribed by the Act. *Id.* at 1237.

In *United States v. Dueno*, 171 F.3d 3 (1st Cir.1999), this court arguably limited *Harris* in one respect. In *Dueno*, the government sought to characterize the predicate guilty pleas based not on the original police reports in the state court case files but rather upon the federal presentence report"s description of the underlying criminal conduct. *Id.* at 6-7. This had also been true in *Harris* but there no one had contested the reliance on the PSR. In *Dueno*, the court—though describing the issue as a close one—declined to allow the PSR alone to resolve the issue. *Id.* at 7.

The *Dueno* court endorsed *Harris's* general approach—as it had to do absent *en banc* review, *see Irving v. United States*, 162 F.3d 154, 160 (1st Cir.1998) (en banc), *cert. denied* 528 U.S. 812, 120 S.Ct. 47, 145 L.Ed.2d 41 (1999)—but it noted that not a single document from the original state court case files had been submitted for consideration, nor was there any other "account of what took place at Dueno"s plea hearing." *Dueno*, 171 F.3d at 7. Absent any indication that the PSR accurately repeated the information from the original state court documents, the *Dueno* court rejected reliance on the PSR's description of the criminal conduct to rescue an enhanced sentence whose primary ground was admittedly in error. *Id.*

Our *en banc* court sought to clarify our stance on presentence reports in a published order released shortly after *Dueno*.[5] We explained:

> Our cases have approved resort to pre-sentence reports but only to determine the character of the criminal offense for which the defendant was convicted (not whether violence was or was not used on the particular occasion) [citing *Harris*], where that determination cannot be made from the statutory language itself or from the charging documents, and only where the report was sufficiently reliable on this issue [citing *Dueno*].

United States v. Sacko, 178 F.3d 1, 7-8 (1st Cir.1999) (en banc order, June 16, 1999). While this order does not spell out what makes a PSR "reliable," and other circuits are split on this issue, *compare United States v. Adams*, 91 F.3d 114, 116 (11th Cir.1996) (relying on PSR), *with United States v. Potter,* 895 F.2d 1231, 1238 (9th Cir.1990), *cert. denied* 497 U.S. 1008, 110 S.Ct. 3247, 111 L.Ed.2d 757 (1990) (generally rejecting PSR), it does make clear two things: first, presentence reports can be used in some situations; second, *Harris* remains solid precedent in this circuit even after *Dueno*.

In Shepard's case the reliability of PSR descriptions is not even an issue, for the government secured the original state court case files from six of Shepard's prior convictions, found in them the complaint applications and police reports that had prompted the complaints, and made the latter available to the federal sentencing court (and so also to us). And Shepard has

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[5] This order was in response to the government"s motion for a rehearing *en banc* in *United States v. Sacko*, 178 F.3d 1, 7 (1st Cir.1999). *Sacko* was released three days before *Dueno* and was arguably in tension with the later opinion. Since the *Sacko* panel released an erratum altering the language in *Sacko*, our court denied the petition for rehearing, but took the opportunity "to make clear the en banc court"s view as to what is now settled law in this circuit." *Sacko*, 178 F.3d at 7.

been given a full opportunity (by the remand in *Shepard II*) to explain any circumstance surrounding the pleas that might defeat the natural inference that the pleas were to the crimes described in the case files.

Of course, it is barely possible that someone in Shepard"s position might have pled guilty, not to the charge that underlay the complaint (namely, burglary of a building), but to the burgling of some other venue such as a boat arguably not within the definition of generic burglary. Conceivably, at the plea hearing someone might have explained in mitigation that 258 Norwell Street was actually a boat dock address or, in a different instance, that Shepard"s target was not the Jamaica Plain High School gymnasium but merely a car parked in front.

This, we say, is conceivable but highly unlikely; and it is even less likely—to the point of nearly impossible--that it or anything like it happened for most of Shepard"s predicate pleas, and that the police reports were mistaken as to venue for four or more of the six crimes. Nor on remand did Shepard offer any evidence that this had happened; he said only that he had not specifically admitted in open court to breaking into houses and that the underlying police reports were not read to him at the plea hearings.

Against this background, it is "clearly erroneous" to find that Shepard did not plead guilty to at least three burglaries of buildings. Absent other evidence of peculiar circumstances, there is a compelling inference that the plea was to the complaint and that the complaint embodied the events described in the application or police report in the case file. If there were countervailing evidence to defeat the inference, we would defer to any reasonable interpretation of the conflict by the trier of fact. But there is no other evidence, nor is it easily imaginable that there would be.

In *Harris* Judge Breyer referred to what the government and defendant "believed" to be the subject of the predicate plea; but he did not suggest that this required direct evidence of the parties" subjective states of mind. *Harris*, 964 F.2d at 1236. His concern was with the nature of the proceedings: in upholding the enhancement *Harris* relied on objective evidence to characterize the pleas—namely, on police reports in the case files. Unimpeached, those files carried the day in *Harris*; they do so here as well.

Our view accords with that of the Fourth Circuit in *Coleman,* 158 F.3d at 202-03. In *Coleman*, the *en banc* court approved consideration of the "statement of charges" filed by a "complaining witness"—Maryland"s equivalent of Massachusetts"s complaint application—in order to determine whether the predicate crime qualified under the Act. *Id.* While the *Coleman* court mentioned that this document was formally considered part of the "charging papers" under Maryland law, we do not see how the label given to the document should make a difference, particularly in light of *Taylor's* forceful rejection of the use of state labels. *Taylor*, 495 U.S. at 590-92, 110 S.Ct. 2143.

Judged by what Congress wanted, this case is not a close call. If this court's precedents have confused matters, that is our own fault but it is no reason to perpetuate confusion. *Harris*, with the reliability qualification adopted by *Dueno* as to the PSR (a point not litigated in *Harris* and irrelevant here), is the law of this circuit until the Supreme Court or an *en banc* panel rules otherwise.[6] On remand, the district court must sentence Shepard under the Act and apply the mandatory minimum prescribed by Congress.

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[6] In addition to the tension between the two decisions, our own prior remand in *Shepard II* may further have complicated matters by not calling attention to the *en banc* order in *Sacko*. In all events, none of this confusion is the fault of the district judge who sought conscientiously to carry out this court"s earlier mandate.

The sentence of the district court is *vacated* and the matter *remanded* for re-sentencing in conformity with this decision.

Docket for 03-9168

No. 03-9168	Status: GRANTED
Title:	REGINALD SHEPARD, *Petitioner*
	v.
	UNITED STATES
Docketed:	March 1, 2004
Lower Ct:	United States Court of Appeals for the First Circuit
Case Nos.:	(02-1216)
Decision Date:	November 3, 2003
Rehearing Denied:	November 24, 2003

Questions Presented

Date	Proceedings and Orders
Feb 23 2004	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 31, 2004)
Mar 9 2004	Waiver of right of respondent United States to respond filed.
Mar 11 2004	DISTRIBUTED for Conference of March 26, 2004.
Mar 12 2004	Response Requested. (Due April 12, 2004)
Apr 7 2004	Order extending time to file response to petition to and including May 12, 2004.
May 7 2004	Brief of respondent United States in opposition filed.
May 19 2004	DISTRIBUTED for Conference of June 3, 2004.
Jun 14 2004	DISTRIBUTED for Conference of June 17, 2004.
Jun 21 2004	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.

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SUPREME COURT OF THE UNITED STATES
GRANTED & NOTED LIST - CASES TO BE ARGUED
OCTOBER TERM 2004

As of June 21, 2004

105, Orig. *KANSAS V. COLORADO*
Order: 6/1/04 - Set for oral argument

02-1028 *CFX NORFOLK SOUTHERN RWY. CO. V. JAMES N. KIRBGY PTY.*
Court: USCA-11 Grant: 1/9/04

02-1192 *CFX COOPER INDUSTRIES V. AVIALL SERVICES*
Court: USCA-5 Grant: 1/9/04

02-1472)[1] *CFX CHEROKEE NATION OF OKLAHOMA V. THOMPSON, SEC. OF H&HS*

03-853)[2] *CFX THOMPSON, SEC. OF H&HS V. CHEROKEE NATION OF OKLAHOMA*
Court: 1USCA-10; 2USCA-Fed. *Grant:* 3/22/04

02-1672 *CFX JACKSON V. BIRMINGHAM BOARD OF EDUCATION*
Court: USCA-11 Grant: 6/14/04

03-184)[1] *CFX BALLARD V. CIR*

03-1034)[2] *CFX ESTATE OF KANTER V. CIR*
Court: [1]USCA-11; [2]USCA-7 Grant: 4/26/04

03-287 *CFX WILKINSON V. DOTSON*
Court: USCA-6 Grant: 3/22/04

03-377 *CFX KOONS BUICK PONTIAC GMC V. NIGH*
Court: USCA-4 Grant: 1/20/04

03-407 *CFX KOWALSKI V. TESMER*
Court: USCA-6 Grant: 1/20/04

03-409 *CFX KP PERMANENT MAKE-UP, INC. V. LASTING IMPRESSIONS, INC.*
Court: USCA-9 Grant: 1/9/04

03-583 *CFX LEOCAL V. ASHCROFT, ATTY. GEN.*
Court: USCA-11 Grant: 02/23/04

03-633 *CSH ROPER V. SIMMONS*
Court: SC-MO Grant: 1/26/04

03-636 *CFX JOHNSON V. CALIFORNIA*
Court: USCA-9 Grant: 3/1/04

03-674 *CFH JAMA V. INS*
Court: USCA-11 Grant: 02/23/04

03-710 *CFX DEVENPECK V. ALFORD*
Court: USCA-9 Grant: 4/19/04

03-725 *CFY PASQUANTINO V. UNITED STATES*
Court: USDC-Dist. of MD Grant: 4/5/04

03-750 *CFY SMALL V. UNITED STATES*
Court: USCA-3 Grant: 3/29/04

03-814 *CFX STEWART V. DUTRA CONSTRUCTION COMPANY*
Court: USCA-1 Grant: 2/23/04

03-878)[1] *CFH CRAWFORD V. MARTINEZ*
03-7434)[2] *CFH BENITEZ V. WALLIS, DIST. DIR., INS*
Court: [1]USCA-9 [2]USCA-11 Grant: [1]3/1/04; [2]1/16/04

03-892)[1] *CFX COMMISSIONER OF INTERNAL REVENUE V. BANKS*
03-907)[2] *CFX COMMISSIONER OF INTERNAL REVENUE V. BANAITIS*
Court: [1]USCA-6; [2]USCA-9 Grant: 3/29/04

03-923 *CSY ILLINOIS V. CABALLES*
Court: SC-IL Grant: 4/5/04

03-931 *CSH FLORIDA V. NIXON*
Court: SC-FL Grant: 3/1/04

03-1039 *CFH GOUGHNOUR V. PAYTON*
Court: USCA-9 Grant: 5/24/04

03-1116)[1] *CFX GRANHOLM, GOV. OF MI V. HEALD*
03-1120)[1] *CFX MI BEER & WINE WHOLESALERS V. HEALD*
03-1274)[2] *CFX SWEDENBURG V. KELLY*
Court: [1]USCA-6; [2]USCA-2 Grant: 5/24/04

03-1160 *CFX SMITH V. CITY OF JACKSON*
Court: USCA-5 Grant: 3/29/04

03-1164) *CFX VENEMAN, SEC. OF AGRIC. V. LIVESTOCK MARKETING*
03-1165) *CFX NEBRASKA CATTLEMEN, INC. V. LIVESTOCK MARKETING*
Court: USCA-8 Grant: 5/24/04

03-1293) *CFY WHITFIELD V. UNITED STATES*
03-1294) *CFY HALL V. UNITED STATES*
Court: USCA-11 Grant: 6/21/04

03-1407 *CFX ROUSEY V. JACOWAY*
Court: USCA-8 Grant: 6/7/04

03-1423 *CFX MUEHLER V. MENA*
Court: USCA-9 Grant: 6/14/04

03-8661 *CSY SMITH V. MASSACHUSETTS*
Court: AP-MA Grant: 6/14/04

03-9168 *CFY SHEPARD V. UNITED STATES*
Court: USCA-1 Grant: 6/21/04

NOTE:

No. of Cases made available for Argument: 39

No. of Hours made available: 31

CASE CODE KEY

■ First Letter = Jurisdictional Grounds (ex. 99-804 CFY)

C – Certiorari

A - Appeal

Q - Certified Question

■ Second Letter = Court Below (ex. 99-804 CFY)

S - State

F - U.S. Court of Appeals

T - Three-Judge District Court

M - U.S. Court of Appeals for the Armed Forces

O - Other Court

■ Third Letter = Nature of Case (ex. 99-804 CFY)

X - Civil

Y - Criminal

H - Habeas Corpus or other collateral attack

03-9168

Petition filed February 23, 2004

August 27, 2004: Joint appendix filed. (Joint appendix in three volumes. Volume II is sealed.)

Argued November 8, 2004

Volume II not filmed

(3)

AUG 27 2004

No. 03-9168

IN THE

Supreme Court of the United States

REGINALD SHEPARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX VOLUME III

PAUL D. CLEMENT*
ACTING SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
Washington, D.C. 20530
(202) 514-2217

Counsel for Respondent

LINDA J. THOMPSON*
JOHN M. THOMPSON
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1331 Main Street
Springfield, MA 01103
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JEFFREY T. GREEN
KEVIN M. HENRY
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner
* Counsel of Record

August 27, 2004

PETITION FOR CERTIORARI FILED FEBRUARY 23, 2004
CERTIORARI GRANTED JUNE 21, 2004

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Suffolk, ss.

Boston, 9 February 198 1

I have heretofore, to wit: on the day on which the offence is laid in the within complaint, without a warrant, arrested the body of the within-named defendant

and he gave bail to appear

and now have him before the

within-named Court for examination.

John P. Curran
Police Officer.

Joint Jurisdiction

Chap. 266 Sect. 18

Penalty:

Fine NLT NMT

and or

Impr. NLT NMT
State Prison 10 years or by a
~~Fine~~ Fine NMT $500.00 and
Impri in Jail for NMT 2 years

OCT 13 1983

TERMINATED CHARGED gFm

DISTRICT COURT DEPARTMENT
of the
WEST ROXBURY DIVISION

198 1 No. 76116

COMMONWEALTH

ON COMPLAINT OF

John P. Curran

vs.

Reginald D. Shepard

Breaking and Entering and Larceny (Day Time)

Date of Arraignment: 9 February 1981

D. appeared ~~with~~(out) Counsel before Judge JMC ; (who as required appointed Counsel Gronosky ~~(permitted~~ [instructed] D. to retain Private Counsel) and entered a plea of Not Guilty.

Case continued until 9 March 1981 mjc

Further continuance

Plea Finding

Date

Judge

Disposition: ~~DEFAULT WARRANT TO ISSUE~~ 3/11/81

Court Costs $ Danny J

Appeal claimed (over) JBW

On Bail Hearing D. was represented by Counsel, and if not, Judge appointed Atty. as Counsel.

Surety Set

D., in presence of Atty. notified of Right To Appeal Surety.

Further Continuances:

JUL 21 1981 dn on warrant default removed Cont 8-18-81 atty Carroll appt for trial Subpoena victim return 8-18-81 Murphy J FM

Remarks:

AUG 18 1981

DEFAULT WARRANT TO ISSUE

Joseph Root

SEP 16 1981 en on Warrant remov default - Cont 10-15 8 F atty Wood appt.

Atty. appearance filed ( )

Subpoena Victim 9/16

Root PT/100

Guilty
One Year H&C
Suspended & Probation
+ Oct 13, 1983

Danny J
JBW
(No appeal taken)

True copy attest

Commonwealth of Massachusetts

SUFFOLK, TO WIT:

To The West Roxbury Division of the District Court Department, holden at the City of Boston, for the transaction of criminal business, within the County of Suffolk.

John P. Curran

of said Boston,

in behalf of The Commonwealth of Massachusetts, on oath complains that

Reginald D. Shepard

, of said Boston,

on the ninth day of February

in the year of our Lord one thousand nine hundred and eighty one,

at said Boston, and within the judicial district of said Court,

in the day time, did break and enter the gymnasium located in the Jamaica Plain High School situated and numbered 144 McBride Street, Jamaica Plain, Massachusetts, with the intent to steal and did steal therein athletic clothes valued at $20.00 the property of one Thomas Richardson

against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

John P Curran

SUFFOLK, TO WIT:

Received and sworn to, this ninth day of February

in the year of our Lord one thousand nine hundred and eighty one.

BEFORE SAID COURT,

Assistant Clerk.

X4989

WEST ROXBURY

1. ARRESTING OFFICER OR APPLICANT Det. Robert P. MALONEY DISTRICT AREA E.

2. DEFENDANT SHEPARD, REGINALD D. D.O.B 4-21-62 AGE

3. DEFENDANT'S ADDRESS 31 CRAWFORD ST ROXBURY

4. RACE B SEX M HT 5-9 WT 140 HAIR BLK EYES BRN COMPLEXION OTHER

5. DATE OF OFFENSE 2/9/81 DATE OF ARRAIGNMENT 2/9/81 CC# 1098609

6. OFFENSE ~~B&E~~ B&E D/T CHAPTER 266 SECTION ~~1~~ 1

IN THAT THE DEFENDANT DID BREAK & ENTER THE GYMNASIU
OF THE JAMAICA PLAIN HIGH SCHOOL BY MEANS OF A KEY & DID STEA
ATHLETIC CLOTHES VALUED @ $20.00 + 1 SET OF KEYS VALUED @ $10.00
PROPERTY OF THOMAS RICHARDSON PROPERTY OF HUGH MULLEN

7. DATE AND TIME OF ARREST (IF ANY)

8. SUMMARY OF CASE, EDVIDENCE AND FACTS ABOUT 8:00AM 2/9/81 THE DEFENDANT DID BREAK & ENTER THE GYMNASIUM OF JAMAICA PLAIN HIGH + DID STEAL ATHLETIC CLOTHES VALUED @ $20.00 + 1 SET OF KEYS VALUED @ $10.00 - THE PROPERTY OF HUGH MULLENS - BY MEANS OF A SET OF KEYS.

OK CLK

Signed under the pains and penalties of perjury

2/9/81
(DATE)

(SIGNATURE OF ARRESTING OFFICER)

DISTRICT OR UNIT

9. WITNESSES

	ADDRESS
P.O ROBERT WILSON	AREA 13
P.O THOMAS WALSH	" 13

10. LIST DATES WHEN OFFICER IS AVAILABLE TO TESTIFY OR HAS OTHER CASES SCHEDULED IN THIS COURT:

LIST OF DATES WITHIN NEXT THREE WEEKS WHEN POLICE OFFICERS OR OTHER WITNESSES ARE NOT AVAILABLE.

Edward J Bennett Det 4688 SQUAD

11. SIGNATURE OF OFFICER MAKING PRESENTATION OF THIS APPLICATION BEFORE THE COURT

True copy attest John B Walsh

DOCKET | DOCKET NUMBER 8907 CR 4433 mn

COURT DIVISION: Dorchester

NAME, ADDRESS AND ZIP CODE OF DEFENDANT:

Reginald Shephard
63 Slayton Way
Roxbury,Mass.

CC#91-394783

DEF DOB AND SEX: 4/21/62 | OFFENSE CODE(S): 205

DATE OF OFFENSE: 5/6/89 | PLACE OF OFFENSE: 30 Harlem St.

COMPLAINANT: Det. Mosher | POLICE DEPARTMENT: Area B3

DATE OF COMPLAINT: 5/23/89 | RETURN DATE AND TIME: WARRANT

COUNT OFFENSE: A.B&E NIGHT TIME, INT. TO COMMIT A FELONY C266 S16

DATE: JUL 20 1989 | PLEA: Not Guilty / Guilty / Nolo / New Plea / Admits suff. facts

FINDING: SF | JUDGE: Butler

Cont. w/o finding until: OCT 11

Appeal of find. & disp. / Appeal of disp.

FINE: | SURFINE: | COSTS: | TOTAL DUE:

IMPRISONMENT AND OTHER DISPOSITION: 2 yrs. HOC s/s 10-11-91

FINAL DISPOSITION: Discharged from probation / Dismissed at request of probation | DATE:

Waived / Retained / Assigned: O'Rourke

TERMS OF RELEASE: Personal

DATE	PROCEEDING
	Arraigned before J. Butler
	Advised of right to counsel
	Advised of right to drug exam
JUL 20 1989	Advised of right to bail review
	Advised of right to F.I. Jury Trial — Waives / Requests F.I. Jury Trial
9-22-89	Warrant issued — Default warrant issued
10-2-89	Default removed — Warrant recalled
5-21-91	Warrant issued — Default warrant issued
7-18-91	Default removed — Warrant recalled

FINE: | SURFINE: 100.00 | COSTS: | TOTAL DUE:

IMPRISONMENT AND OTHER DISPOSITION: 2 yrs. HOC s/s 10-11-91

FINAL DISPOSITION: Discharged from probation / Dismissed at request of probation | DATE:

COUNT OFFENSE:

DATE: | PLEA: Not Guilty / Guilty / Nolo / New Plea / Admits suff. facts

FINDING: | JUDGE:

Cont. w/o finding until:

Appeal of find. & disp. / Appeal of disp.

FINE: | SURFINE: | COSTS: | TOTAL DUE:

IMPRISONMENT AND OTHER DISPOSITION:

FINAL DISPOSITION: Discharged from probation / Dismissed at request of probation | DATE:

THEREBY CERTIFY THAT THIS IS A TRUE COPY, GIVEN UNDER MY HAND AND SEAL THIS 11TH DAY OF OCTOBER 1991.

Paul S. Perrin
CLERK-MAGISTRATE
ASSISTANT CLERK

COUNT OFFENSE:

DATE: | PLEA: Not Guilty / Guilty / Nolo / New Plea / Admits suff. facts

FINDING: | JUDGE:

Cont. w/o finding until:

Appeal of find. & disp. / Appeal of disp.

FINE: | SURFINE: | COSTS: | TOTAL DUE:

IMPRISONMENT AND OTHER DISPOSITION:

FINAL DISPOSITION: Discharged from probation / Dismissed at request of probation | DATE:

CONT TO	PURPOSE	CONT TO	PURPOSE
9-22-89	Hrng	4-29-91	SH
10-11-89	Hrng	4-9-91	SH
10-11-91	Rev	4-23-91	SH
8-31-90	SH	5-21-91	SH

DATE	TAPE NO	START	STOP
10-11-89	4258	1703	3237
7-31-91	10 B1	2758	3594
[illegible]	Motion		

CRIMINAL DOCKET | 8907 CR 4433 mn

COURT DIVISION: Dorchester

NAME, ADDRESS AND ZIP CODE OF DEFENDANT:

Reginald Shephard
63 Slayton Way
Roxbury,Mass.

CC#91-394783

DEF DOB AND SEX: 4/21/62 | OFFENSE CODE(S): 205

DATE OF OFFENSE: 5/6/89 | PLACE OF OFFENSE: 30 Harlem St.

COMPLAINANT: Det. Mosher | POLICE DEPARTMENT: Area B3

DATE OF COMPLAINT: 5/23/89 | RETURN DATE AND TIME: WARRANT

COUNT OFFENSE: A.B&E NIGHT TIME, INT. TO COMMIT A FELONY C266 S16

District Court Department

TO ANY JUSTICE OR CLERK-MAGISTRATE
OF THE DISTRICT COURT DEPARTMENT

The within named and undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below:

did break and enter in the night time the building, ship, vessel or vehicle, the property of Jerri Cothran, with intent to commit a felony therein, in violation of G.L. c.266, s.16.

COUNT OFFENSE:

COUNT OFFENSE:

COUNT OFFENSE:

I HEREBY CERTIFY THAT THIS IS A TRUE COPY, GIVEN UNDER MY HAND AND SEAL THIS 11TH DAY OF OCTOBER 1991.

Paul S. Perrin
CLERK-MAGISTRATE
ASSISTANT CLERK

COMPLAINANT: x David W. Sabella | SWORN TO BEFORE CLERK MAGISTRATE/ASST. CLERK: x Janet Buckley | ON (DATE): 5/23/89 | ☐ ADDITIONAL COUNTS ATTACHED

FIRST JUSTICE: James W. Dolan

COURT ADDRESS: 510 Washington Street
Dorchester MA. 02124

APPLICATION FOR COMPLAINT ☒ ADULT ☐ JUVENILE 8907CR7055

☐ ARREST ☐ HEARING ☐ SUMMONS ☒ XX WARRANT

The within named complainant requests that a complaint issue against the within named defendant, charging said defendant with the offense(s) listed below

District Court Department

COURT DIVISION

Dorchester District Court
510 Washington Street
Dorchester, MA 02124

DATE OF APPLICATION	DATE OF OFFENSE	PLACE OF OFFENSE
05/22/89	05/06/89	30 Harlem St.,Dorchester

NAME OF COMPLAINANT
Detective Raymond R. Mosher Sr.

ADDRESS AND ZIP CODE OF COMPLAINANT
C/O Boston Police Area B-3

1165 Blue Hill Ave.,Dorchester Mass. 02124

NAME, ADDRESS AND ZIP CODE OF DEFENDANT
Reginald Shephard

63 Slayton Way

Roxbury Mass. 02119

NO	OFFENSE	G.L. Ch. and S.
1	Breaking and Entering Night (205)	Chp. 266 Sec. 16
2		
3		
4		

COURT USE ONLY → A hearing upon this complaint application will be held at the above court address on DATE OF HEARING AT TIME OF HEARING ← COURT USE ONLY

CASE PARTICULARS — BE SPECIFIC

NO	NAME OF VICTIM Owner of property person assaulted, etc	DESCRIPTION OF PROPERTY Goods stolen, what destroyed, etc	VALUE OF PROPERTY Over or under $250	TYPE OF CONTROLLED SUBSTANCE OR WEAPON Marijuana, gun, etc
1	Jerri Cothran 30 Harlem St.,Dor.	Cellar Door		
2				
3				
4				

SIGNED AND SWORN TO UNDER MY HAND AND SEAL THIS 5TH DAY OF OCTOBER 1989

Paul S. Perman
ASSISTANT CLERK

OTHER REMARKS: B.P.D. CC# 91-394-783

Raymond R. Mosher Sr.
SIGNATURE OF COMPLAINANT

DEFENDANT IDENTIFICATION INFORMATION — Complete data below if known

DATE OF BIRTH	PLACE OF BIRTH	SOC. SECURITY NUMBER	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
04/21/62	N. Carolina	021-54-8744	M	B/N	5'10"	145	Brn	Blk

OCCUPATION	EMPLOYER/SCHOOL	MOTHER'S NAME MAIDEN	FATHER'S NAME
		Ann Shephard	Robert

COURT USE ONLY

DATE	DISPOSITION	AUTHORIZED BY
5/22/89	NO PROCESS TO ISSUE At request of complainant Complainant failed to prosecute Insufficient evidence having been presented PROCESS TO ISSUE — Sufficient evidence presented Defendant failed to appear TYPE OF PROCESS — ~~Warrant~~ Summons returnable _____ Continued to _____	2

COMMENTS

Boston Police
INCIDENT REPORT

HANDPRINT

ORIGINAL ☐ SUPPLEMENTARY ☐

01. KEY SITUATIONS: ☐ DRUGS ☐ LICENSED PREMISES ☐ ELDERLY ☐ JUVENILE ☐ COMMUNITY DISORDERS ☐ DOMESTIC ☐ OTHER
02. COMPLAINT NO. 91-394-783
03. REPORT DIST. B3
04. TYPE OF INCIDENT: B&E Night Time
05. CRIME CODE
06. STATUS ☐ ARREST ☐ WARRANT ☐ UNFOUNDED ☐ EXCEPT'L CL. ☐ UNDER 18
07. DATE OF OCCUR
08. LOCATION OF INCIDENT AND STREET (INTERSECTION, ETC. OR OTHER): 30 Harlem St Dor
09. DISPATCH TIME
10. TIME OF OCCUR
11. VICTIM-COMP (LAST, FIRST, MI): Cothran, Jerri
12. PHONE: 288 4624
13. SEX: F
14. RACE: B
15. MARITAL STATUS ☐ MARRIED ☐ UNMARRIED
16. ADDRESS AND STREET, CITY AND STATE IF OTHER THAN BOSTON OR ZIP: Same
17. OCCUPATION: Student
18. AGE: 33
19. D.O.B.: 1-4-56
20. PERSON REPORTING IF DIFFERENT THAN ABOVE: Same
21. ADDRESS
22. PHONE
23. NUMBER OF PERPETRATORS: 1
24. ☐ ARREST ☐ WARRANT ☐ MISSING ☐ SUMMONS ☐ SUSPECT
25. NAME (LAST, FIRST, MI): Shephard, Reginald
26. S.S. NO: Unk
27. BOOKING NO
28. PHOTO NO
29. ALIAS: Unk
30. WARRANT NO
31. ADDRESS: Unk
32. SEX: M
33. RACE: B
34. AGE: 26
35. HEIGHT: 5'6
36. D.O.B.: Unk
37. SPECIAL CHARACTERISTICS (INCLUDING CLOTHING): Wht/blk hooded sweatshirt, blk pants, wht sneakers, blk jacket
38. WEIGHT: 140
39. BUILD: Med
40. HAIR: Blk
41. EYES: Brn
42. CAN SUSPECT VEHICLE BE DESCRIBED?
43. ☐ STOLEN ☐ RECOV ☐ LV SCENE ☐ ABAND ☐ IN CUST ☐ TOWED ☐ USED IN CRIME ☐ OTHER: NA
44. REG STATE NO
45. PLATE TYPE
46. YEAR (EXP.)
47. MODEL
48. VEHICLE MAKE-YEAR
49. VEHICLE NO
50. STYLE
51. OPERATOR'S NAME
52. LICENSE NO
53. OWNER'S NAME
54. OWNER'S ADDRESS
55. CAN PROPERTY BE IDENTIFIED?
56. TYPE OF PROPERTY: NA
57. SERIAL OR I.D. NO.
58. BRAND NAME DESCRIPTION
59. VALUE
60. LIC
61. RECOV
62. TYPE OF WEAPON/TOOL
63. NEIGHBORHOOD
64. TYPE OF BUILDING
65. PLACE OF ENTRY: Cellar door
66. WEAPON
67. LIGHTING: Unk
68. TRANSPORTATION OF SUSPECT (CAR FOOT, ETC.)
69. VICTIM'S ACTIVITY
70. CRIMINAL ACTIONS AND STATEMENTS OF PERPETRATOR
71. RELATIONSHIP TO VICTIM
72. IS THERE ANY PHYSICAL EVIDENCE (DESCRIPTION AND DISPOSITION IN NARRATIVE)
73. IS THERE ANY OTHER REASON FOR FURTHER INVESTIGATION (REASON BELOW)
74. NARRATIVE AND ADDITIONAL INFORMATION

Abut 3rd. Officers Connolly, Bykota heard 411 29 yards (to RC To 3 Hart St to B&E in progress. On arrival obs. rear cellar door in rear had been broken down. Spoke to victim who stated that upon her arrival home, she found the rear door to the cellar open. She then entered the house and conducted a search of the entire premises. She observed suspect run out the rear door of the cellar and onto the property of 30 Harlem St. Suspect then exited the property and onto Harlem St. Victim states suspect is unknown to her. Victim has no further information. Scene secured by Officers of Dist 3. Report to follow. Det Unit notified. Dist 3

75. SUPPLEMENTARY NARRATIVE
76. ASSIGNED
77. TOUR OF DUTY: 1
78. REPORTING OFFICER'S SIGNATURE: Officer Connolly
79. REPORTING OFFICER I.D.
80. SUPERIOR O.
81. DATE/TIME REPORT
82. DATE/TIME COMPLETED
83. SPECIAL UNITS NOTIFIED
84. SIGNATURE OF PATROL SUPERVISOR
85. PAT SLIP #
86. SIGNATURE DUTY SUPERVISOR
87. DUTY SLIP #
88. TELETYPE NO

YES ☐ NO ☐ A ☐ B ☐ C ☐ D ☐ E ☐ F ☐ G

I HEREBY CERTIFY THAT THIS IS A TRUE COPY GIVEN UNDER MY HAND AND SEAL THIS 5TH DAY OF OCTOBER 1989

Paul S. Perman
CLERK-MAGISTRATE
ASSISTANT CLERK

CRIMINAL COMPLAINT

Boston Municipal Court

NAME, ADDRESS AND ZIP CODE OF DEFENDANT

Reginald D Shepard
S Weaver Way
Roxbury Ma

Trial Court of Massachusetts
Boston Municipal Court Department

TO ANY JUSTICE OR CLERK-MAGISTRATE
OF THE BOSTON MUNICIPAL COURT DEPARTMENT

The within named and undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below in the City of Boston and within the judicial district of Boston Municipal Court.

DATE OF BIRTH	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
4/21/62	M	B	5'10	180	Brn	Blk

CC #: 01902588 210 329

DATE OF OFFENSE: 10/10/90
PLACE OF OFFENSE: 446 Shawmut Ave

COMPLAINANT: William Battos/Lio
POLICE DEPARTMENT: Area D

DATE OF COMPLAINT: 10/11/90
RETURN DATE AND TIME:

COUNT-OFFENSE
A. B&E DAY TIME, INT. TO COMMIT A FELONY C266 S18

did break and enter in the day time the building, ship, vessel or motor vehicle of Craig Milanesi with intent to commit a felony therein, in violation of G.L. c.266, s.18.

COUNT-OFFENSE
B. POSSESSION OF BURGLARIOUS TOOLS C266 S49

did knowingly have possession of certain machines, tools, and implements adapted and designed for cutting through, forcing and breaking open buildings, rooms, vaults, safes, and other depositories, in order to steal therefrom such money and other property as might be found therein or to commit any other crime, said defendant knowing said machines, tools, and implements to be adapted and designed for the purpose aforesaid and intending to use and employ them therefor, in violation of G.L. c.266, s.49.

COUNT-OFFENSE
C.

A TRUE COPY ATTEST
Daniel J Hogan
CLERK MAGISTRATE

COUNT-OFFENSE
D.

COMPLAINANT OR AUTHORIZED OFFICER	SWORN TO BEFORE CLERK-MAGISTRATE/ASST. CLERK	ON (DATE)	ADDITIONAL COUNTS ATTACHED
X William R. Battos	Deputy Francis Caffrey	10-11-90	☐

CHIEF JUSTICE: William J. Tierney

COURT ADDRESS: Boston Municipal Court
Criminal Division
Fourth Floor, New Court House
Boston, MA 02108

A TRUE COPY ATTEST: X — CLERK-MAGISTRATE/ASST. CLERK — ON (DATE)

APPLICATION FOR COMPLAINT

NUMBER

☒ ARREST ☐ HEARING ☐ SUMMONS WARRANT

The within named complainant requests that a complaint issue against the within named defendant, charging said defendant with the offense(s) listed below

Trial Court of Massachusetts
Boston Municipal Court Department
Boston Municipal Court
Criminal Division, Room 411 —
Fourth Floor, New Court House
Boston, MA 02108

DATE OF APPLICATION	DATE OF OFFENSE	PLACE OF OFFENSE
10-11-90	10-10-90	446 SHAWMUT AVE

NAME, ADDRESS AND ZIP CODE OF COMPLAINANT
P.O. A. LIO
P.O. J. ALFONSO William Battos

NO	OFFENSE	M.G.L. Ch. and Sec.
1	B+E	210 266.18
2	POSS BURGLARIOUS TOOLS	329 266 49
3		
4		

NAME, ADDRESS AND ZIP CODE OF DEFENDANT
SHEPARD REGINALD D
9 WEAVER WAY ROX

IF ADDITIONAL OFFENSES CHECK HERE ☐ AND ATTACH

DEFENDANT IDENTIFICATION INFORMATION — Complete data below if known.

CC #	DATE OF BIRTH	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR	SOCIAL SECURITY NUMBER
01902588	4-21-62	M	BLK	5'10	180	BRO	BLK	021548744

COURT USE ONLY → A hearing upon this complaint application will be held at the Boston Municipal Court, Rm. 411 on DATE OF HEARING AT TIME OF HEARING ← COURT USE ONLY

CASE PARTICULARS — BE SPECIFIC

NO	NAME OF VICTIM Owner of property, person assaulted, etc	DESCRIPTION OF PROPERTY Goods stolen, what destroyed, etc	VALUE OF PROPERTY Over or under $100	TYPE OF CONTROLLED SUBSTANCE OR WEAPON Marijuana, gun, etc
1	CRAIG MILANESI			
2	Comm of Mass			Knife
3				
4				

OTHER REMARKS: ABOVE LISTED SUSPECT OBSERVED AT THE REAR OF 446 SHAWMUT ON THE 2ND FLOOR FIRESCAPE WINDOW WAS FULLY OPEN APPARENTLY PRIED OPEN BY KITCHEN KNIFE FOUND ON SUSPECT. DEFENDANT FIT THE DISCRIPTION OF B&E SUSPECT.

x Matthew E. Lio
SIGNATURE OF COMPLAINANT

IF PROCESS IS ORDERED, THIS APPLICATION MUST BE PRESENTED AT ONCE TO PLEADING CLERK AT ROOM 411

NAMES OF WITNESSES	Recog to SC	Give place of business or employment, if in Boston, otherwise, residence	ST NO

A TRUE COPY ATTEST
Daniel J Hogan
CLERK MAGISTRATE

10-11-90
1-2 ROD

State if defendant is arrested _____ Date of Arrest _____

MAC CR 2 (2/86) FOR ADDITIONAL REMARKS OR WITNESSES-USE REVERSE OF ORIGINAL AND CHECK HERE ☐

NC DOCKET

COURT DIVISION: Waltham

OFFICE 1100

NAME, ADDRESS AND ZIP CODE OF DEFENDANT:
Reginald Shepard
9 Weaver Way
Roxbury, Mass.

Waived
Retained
Assigned WARRICK

TERMS OF RELEASE

DATE	PROCEEDING
10/8/91	Arraigned before J.
	Advised of right to counsel
	Advised of right to drug exam
	Advised of right to bail review
	Advised of right to FI Jury Trial
	Waives / Requests FI Jury Trial
	Advised of alien rights
	Warrant issued / Default warrant issued
	Default removed / Warrant recalled
	Warrant issued / Default warrant issued
	Default removed / Warrant recalled

REF. DOB AND SEX: 4/21/62-m
OFFENSE CODE(S): 205
DATE OF OFFENSE: 3/11/91
PLACE OF OFFENSE: Watertown
COMPLAINANT: John B. Real
POLICE DEPARTMENT (if applicable): Watertown
DATE OF COMPLAINT: 3/29/91
RETURN DATE AND TIME: 4/16/91 @ 8:30 a.m.

COUNT OFFENSE: A.&B NIGHT TIME, INT. TO COMMIT A FELONY C266 S16

FINE	SURFINE	COSTS	TOTAL DUE

DATE 10/8/91 PLEA: Not Guilty / Guilty / Nolo / New Plea / Admits suff. facts
FINDING: Guilty JUDGE
Cont. w/o finding until
Appeal of find. & disp. Appeal of disp.
IMPRISONMENT AND OTHER DISPOSITION: 1 yr HOC same sentence w/credit for time served
FINAL DISPOSITION: Discharged from probation / Dismissed at request of probation DATE

COUNT OFFENSE

FINE	SURFINE	COSTS	TOTAL DUE

DATE PLEA: Not Guilty / Guilty / Nolo / New Plea / Admits suff. facts
FINDING JUDGE
Cont. w/o finding until
Appeal of find. & disp. Appeal of disp.
IMPRISONMENT AND OTHER DISPOSITION
FINAL DISPOSITION: Discharged from probation / Dismissed at request of probation DATE

COUNT OFFENSE

FINE	SURFINE	COSTS	TOTAL DUE

DATE PLEA: Not Guilty / Guilty / Nolo / New Plea / Admits suff. facts
FINDING JUDGE
Cont. w/o finding until
Appeal of find. & disp. Appeal of disp.
IMPRISONMENT AND OTHER DISPOSITION
FINAL DISPOSITION: Discharged from probation / Dismissed at request of probation DATE

COUNT OFFENSE

FINE	SURFINE	COSTS	TOTAL DUE

DATE PLEA: Not Guilty / Guilty / Nolo / New Plea / Admits suff. facts
FINDING JUDGE
Cont. w/o finding until
Appeal of find. & disp. Appeal of disp.
IMPRISONMENT AND OTHER DISPOSITION
FINAL DISPOSITION: Discharged from probation / Dismissed at request of probation DATE

A TRUE COPY ATTEST
MICHAEL J. FINNEGAN
FIRST ASST. CLERK

CONT. TO	PURPOSE	CONT. TO	PURPOSE

DATE	TAPE NO.	START	STOP

(1) SEE REVERSE SIDE FOR DOCKET ENTRIES OF MOTIONS, CASE NOTES AND OTHER ACTIONS

CASE REPORT
ARREST REPORT

INCIDENT/ARREST REPORT

CASE NO 911016

01 DATE OF OFFENSE	02 DAY S M T W T F S	03 TIME OF OFFENSE	04 LOCATION OF OFFENSE (No. Street, Apt.)
3-11-91		1450	REAR DOOR TO STOCK ROOM #11
05 DATE REPORTED	06 TIME RPTD	07 DATE OF ARREST	08 Time of Arrest / 09 LOCATION OF ARREST (No. Street, Apt.)
3-11-91	1454		

10 OFFENSE(S): B&E, LARCENY
11 VICTIM'S NAME (Last, First, MI) or BUSINESS NAME: FRETTER'S — 12 SEX — 13 RACE — 14 AGE
15 VICTIM'S ADDRESS (No. Street, Apt.): 550 ARSENAL ST — 16 HOME PHONE: 923-4422
17 CITY / STATE / ZIP: WATERTOWN MA — 18 SS#
19 G. CODE: 4806 / 06B — 20 VICTIM'S PLACE OF EMPLOYMENT OR SCHOOL
21 PERSON REPORTING (If other than victim) NAME, ADDRESS, APT, PHONE: JOE HADEAY - MANAGER - LEO CANNIFF ASST MANAGER
22 WAS THERE A WITNESS TO THE OFFENSE? Yes / No

PERSONS

23 PERSON'S INTERVIEWED	AGE	LOCATION OF INTERVIEW	HOME ADDRESS

24 NUMBER OF PERPETRATORS — CAN SUSPECT BE ... DESCRIBED / IDENTIFIED / NAMED / LOCATED

25	26 NAME (LAST, FIRST, MI)	27 ALIAS	28 SS#
	SHEPARD REGINALD		021548744

29 WARRANT NO	30 ADDRESS	31 Sex	32 Race	33 Age	34 Hgt	35 Wt	36 Build	37 Date of Birth
	9 WEAVER WAY	M	BLK	25	5-6	220	HV	

38 CITY / STATE — 39 SPECIAL CHARACTERISTICS (Beard, Mustach, Scar): — 40 Hair: BLK — 41 Eyes: BRO — 42 Complexion: DARK

43 CAN SUSPECT VEHICLE BE DESCRIBED? Yes / No

VEHICLES

44	45 REG. NO	46 Plate Type	47 Year Exp	48 VEHICLE ID NO

49 VEHICLE MAKE (Year)	50 MODEL	51 STYLE	52 COLOR (Top/Bottom)

53 OPERATOR'S NAME	54 OPERATOR'S ADDRESS	55 LICENSE NO

56 OWNER'S NAME	57 OWNER'S ADDRESS

A TRUE COPY ATTEST
MICHAEL J. FINNEGAN
FIRST ASST. CLERK/MAGISTRATE

58 CAN PROPERTY BE IDENTIFIED? Yes / No

PROPERTY

59 TYPE OF PROPERTY	60 SERIAL/I-DENTI-GUARD NO	61 BRAND NAME - DESCRIPTION	62 EVID	63 RECOVERED	64 VALUE	65 EST. VALUE
V.C.R.'S		EMERSON		✓		880 00

66 IS THERE A SIGNIFICANT M.O. Yes / No

M.O.

67 Type of Weapon-Tool	68 TYPE OF BUILDING	69 POINT/METHOD OF ENTRY	70 METHOD OF ATTACK
MASTER KEY	RETAIL	REAR DOOR	

71 WEATHER	72 LIGHTING	73 TRANSPORTATION USED BY SUSPECT	74 VICTIM'S ACTIVITY	75 PREMISES REPORTED CLOSED
DRY	SUN		WORKING	Yes ☐ No ✓

76 TYPE OF ALARM — ALARM ON ☐ ALARM OFF ☐
77 UNUSUAL M.O. AND STATEMENTS OF PERPETRATOR

78 HAS EVIDENCE TECH. WORK BEEN PERFORMED? ☐ Requested ☐ Performed BY _____ ☐ PHOTO ☐ FINGERPRINT ☐ COMPOSITE
79 IS THERE SIGNIFICANT PHYSICAL EVIDENCE PRESENT? Yes / No
80 IS THERE A SIGNIFICANT REASON TO BELIEVE THAT THIS CRIME MAY BE SOLVED? Yes / No
81 IS A FOLLOW-UP INVESTIGATION NECESSARY? Yes / No

82 NARRATIVE

BOTH WITNESSES WERE IN THE REAR STOCK ROOM, WHEN SUDDENLY THE DOOR OPENED, STANDING THERE WAS SUSPECT HOLDING A MASTER KEY. SUSPECT WAS FIRED APPROX. 1-MONTH AGO, FROM FRETTER. A QUICK INVENTORY, THEY CAME UP WITH ABOVE V.C.R.'S, MISSING. / SUSPECT FLED / WITNESS WILL PROSECUTE.

83 SOLVABILITY: MC-323

UNIT ASSIGNED	85 REPORTING OFFICER'S SIGNATURE / BADGE NO.	86 POLICE DEPT	87 SUPERVISOR'S SIGNATURE	DATE
164	Donald P. Haggerty 110	WATERTOWN		

I.C.A.P. 8/80

WATERTOWN POLICE DEPARTMENT

CASE # 911-016

A TRUE COPY ATTEST
MICHAEL J. FINNEGAN
FIRST ASST. CLERK - MUNICIPAL

Narrative Supplement

☐ CASE REPORT ☐ ARREST REPORT ☐ BOOKING REPORT ☐ _____ PAGE # _____

Sir:

In reference to the above case number involving a B&E&L from the FRETTERS store #550 Arsenal street Town reported on 3-11-91 the following is submitted:

A follow-up investigation revealed that on the above date while the manager,Joe Nadeay and the assistant Manager, Leo Canniff were in the back-room to the above buisness when at about 1450hrs they observed the back door open and observed a former employee, Reginald Shepard of #9 Weaver Way Roxbury, enter the room. Upon seeing the Two managers, the suspect Shepard ran from the room in a northerly direction out the parking lot toward arsenal street.

NOTE* According to both employee's this door was locked and the only way in was with a k which they suspect Shepard has in his possession . They believe that upon Shepards terminatio a few weeks prior he never turned his store keys into the manager.

Upon speaking to Joe Nadeay he stated that he ran outside in an attempt to apprehend the suspect, but he failed,However, he spoke with a cab driver who was parked near the rear door who related to him that he picked up the suspect in Boston and drove him out to the FRETTERS store in Watertown to "Pick up some merchandise that had to be delivered" cab driver stated that the suspect stated to him that he was an employee of the store . An attempt was made to locate the cab and the driver, however, Mr Nadeay failed to obtain the name of the driver or the cab company name.

I also spoke with Bonnie Vincent an employee of Field Facts #550 Arsenal street tel #391-5458 who related that she observed"Regi" at the back door to FRETTERS they had some conversation,however, she related that she did not think anything was unusual as she was familiar with REGI as an employee of the store.

After this incident took place both Nadeay & Canniff did a quick inventory of the backro area and found that (4) Emerson VCR's (2) 13" Hitachi T.V's &(1) 19" Toshiba T.V were missing value over $2000.00 dollars. It is unknown at this time if anything further is missing. As stated suspect was terminated in Febuary 1991.

REPORTING OFFICER	DATE	APPROVED BY	DATE
R.A. Cryan	3/21/91	Sgt J. Conley	3/21/91

WATERTOWN POLICE DEPARTMENT

CASE # 911-016

Narrative Supplement

☐ CASE REPORT ☐ ARREST REPORT ☐ BOOKING REPORT ☐ _____ PAGE # _____

I have also spoke with Officer Joseph Kelly of this department who related to me that a few weeks prior to this incident he made an arrest of (3) individuals in the rear of the Watertown Mall near the rear door , side parking area closets to FRETTERS. At that time an Emerson VCR was found near the suspects in a Green Garbage bag also present but not arrested was Reginald Shepard (Employee of FRETTERS). The VCR was identified as property of Fretters store and returned to same . Mr Leo Canniff stated to me that at that time he observed Reginald Shepard take several green trash bags from the store , he believed it was trash, however, the green bag with the VCR was similar to the bags carried out of the store by Shepard. Because of this incident Shepard was terminated from employment.

Based on the facts above and because the suspect had been terminated from employment at Fretters I respectfully request that he be charged with Breaking and Entering Fretters store on 3-11-91 at 1450hrs. As for the larcenies of the equipment I do not feel there is sufficient evidence to prove the case, however, I do feel Shepard is the guilty party.

Case # 911-016

crime B&E&L

status solved

Reginald Shepard DOB 4-21-62

LKA #9 Weaver Way Roxbury

SS#021-548-744

MC-323

REPORTING OFFICER	DATE	APPROVED BY	DATE
R.A. Cryan	3/21/91	Sgt J. Conley	3/21/91

DOCKET

9107 CR 5135 km

DIVISION: Dorchester

NAME, ADDRESS AND ZIP CODE OF DEFENDANT

CC#11597345

Reginald Shepard
9 Weaver Way
Roxbury, Ma.

☐ Waived
☐ Retained
☒ Assigned Vatsos

TERMS OF RELEASE
ROR

DEF. DOB AND SEX	OFFENSE CODE(S)
04/21/62	210
DATE OF OFFENSE	PLACE OF OFFENSE
07/18/91	258 Norwell St.
COMPLAINANT	POLICE DEPARTMENT (if applicable)
P.O. Luongo	Area B3
DATE OF COMPLAINT	RETURN DATE AND TIME
07/18/91	ARREST

COUNT-OFFENSE
A).B&E DAY TIME, INT. TO COMMIT A FELONY C266 S18

DATE	PROCEEDING
7/18/91	☒ Arraigned before J.b UTLaw
	☐ Advised of right to counsel
	☐ Advised of right to drug exam
	☐ Advised of right to bail review
	☐ Advised of right to F.I. Jury Trial
	☐ Waives ☐ Requests F.I. Jury Trial
	☐ Advised of alien rights
	☐ Warrant issued ☐ Default warrant issued
	☐ Default removed ☐ Warrant recalled
	☐ Warrant issued ☐ Default warrant issued
	☐ Default removed ☐ Warrant recalled

FINE	SURFINE	COSTS	TOTAL DUE

DATE | PLEA: ☐ Not Guilty ☐ Guilty ☐ Nolo ☐ New Plea ☐ Admits suff. facts | FINDING: JUDGE

7-31-91 — GUILTY

IMPRISONMENT AND OTHER DISPOSITION
2 yr H of C
c/c WITH 89-CR-4433
waive 2nd RIGHT of APPEAL

☐ Cont. w/o finding until
☐ Appeal of find. & disp ☐ Appeal of disp

FINAL DISPOSITION — DATE
☐ Discharged from probation
☐ Dismissed at request of probation

COUNT-OFFENSE

FINE	SURFINE	COSTS	TOTAL DUE
			1

DATE | PLEA: ☐ Not Guilty ☐ Guilty ☐ Nolo ☐ New Plea ☐ Admits suff. facts | FINDING: JUDGE

IMPRISONMENT AND OTHER DISPOSITION
MOTION FOR
RECEIVED, ON LIST FOR

☐ Cont. w/o finding until
☐ Appeal of find. & disp ☐ Appeal of disp

FINAL DISPOSITION — DATE
☐ Discharged from probation
☐ Dismissed at request of probation

COUNT-OFFENSE

FINE	SURFINE	COSTS	TOTAL DUE

DATE | PLEA: ☐ Not Guilty ☐ Guilty ☐ Nolo ☐ New Plea ☐ Admits suff. facts | FINDING: JUDGE

IMPRISONMENT AND OTHER DISPOSITION

☐ Cont. w/o finding until
☐ Appeal of find. & disp ☐ Appeal of disp

FINAL DISPOSITION — DATE
☐ Discharged from probation
☐ Dismissed at request of probation

COUNT-OFFENSE

FINE	SURFINE	COSTS	TOTAL DUE

DATE | PLEA: ☐ Not Guilty ☐ Guilty ☐ Nolo ☐ New Plea ☐ Admits suff. facts | FINDING: JUDGE

IMPRISONMENT AND OTHER DISPOSITION
5 OCT 9
Richard J. Dwyer
Clerk-Magistrate

☐ Cont. w/o finding until
☐ Appeal of find. & disp ☐ Appeal of disp

FINAL DISPOSITION — DATE
☐ Discharged from probation
☐ Dismissed at request of probation

CONT TO	PURPOSE	CONT TO	PURPOSE
8 28 91	TRIAL		
7-31-91	Trial		
12-16-91	MOTION		
2-1992	MOTION		

DATE	TAPE NO	START	STOP
7 18 91	965	3972	
7-31-91	1023	2150	3524

9107 CR 5135 km

Trial Court of Massachusetts
District Court Department

DIVISION: Dorchester

NAME, ADDRESS AND ZIP CODE OF DEFENDANT

CC#11597345

Reginald Shepard
9 Weaver Way
Roxbury, Ma.

TO ANY JUSTICE OR CLERK-MAGISTRATE
OF THE DISTRICT COURT DEPARTMENT

The within named and undersigned complainant on behalf of the Commonwealth on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below.

F. DOB AND SEX	OFFENSE CODE(S)
04/21/62	210
TE OF OFFENSE	PLACE OF OFFENSE
07/18/91	258 Norwell St.
MPLAINANT	POLICE DEPARTMENT (if applicable)
P.O. Luongo	Area B3
TE OF COMPLAINT	RETURN DATE AND TIME
07/18/91	ARREST

UNT OFFENSE
A).B&E DAY TIME, INT. TO COMMIT A FELONY C266 S18

did break and enter in the day time the building, ship or vessel of **Monica Collins** with intent to commit a felony therein, in violation of G.L. c.266, s.18.

UNT OFFENSE

I HEREBY CERTIFY THAT THIS IS A TRUE COPY, GIVEN UNDER MY HAND AND SEAL THIS 7th DAY OF October 1999

Paul S. Pirnie
CLERK-MAGISTRATE
ASSISTANT CLERK

UNT OFFENSE

UNT OFFENSE

OMPLAINANT	SWORN TO BEFORE CLERK-MAGISTRATE/ASST. CLERK	ON (DATE)	☐ ADDITIONAL COUNTS ATTACHED
Richard F. Sheehan	x James T. Burke	07/18/91	

FIRST JUSTICE: James W. Nolan

COURT ADDRESS: 510 Washington Street, Dorchester, MA. 02124

A TRUE COPY — CLERK-MAGISTRATE/ASST. CLERK — ON (DATE)

APPLICATION FOR COMPLAINT ☒ ADULT ☐ JUVENILE NUMBER 9107CA05735

Trial Court of Massachusetts
District Court Department

☒ ARREST ☐ HEARING ☐ SUMMONS ☐ WARRANT

The within named complainant requests that a complaint issue against the within named defendant, charging said defendant with the offense(s) listed below.

COURT DIVISION: Dorchester District Court, 510 Washington Street, Dorchester MA 02124

DATE OF APPLICATION	DATE OF OFFENSE	PLACE OF OFFENSE
07/18/91	07/18/91	258 Norwell St. Dor.

NAME OF COMPLAINANT: P.O. Lwongo/P.O. Anderson

ADDRESS AND ZIP CODE OF COMPLAINANT: Area B-3

NAME, ADDRESS AND ZIP CODE OF DEFENDANT: Reginald Shepard, 9 Beaver Way, Roxbury MA.

NO.	OFFENSE	G.L. CHAPTER and SECTION
1.	B/E Daytime	266/16
2.		
3.		
4.		

COURT USE ONLY → A hearing upon this complaint application will be held at the above court address on DATE OF HEARING AT TIME OF HEARING ← COURT USE ONLY

CASE PARTICULARS — BE SPECIFIC

NO.	NAME OF VICTIM / Owner of property / person assaulted, etc	DESCRIPTION OF PROPERTY Goods stolen, what destroyed, etc.	VALUE OR PROPERTY Over or under $250.	TYPE OF CONTROLLED SUBSTANCE OR WEAPON Marijuana, gun, etc.
1	Monica Collins	VCR	over	N/A
2	258 Norwell St Apt 2 Dorchester ma	Phone/Ans. machine		
3				
4				

OTHER REMARKS: See a/c # 11597345

x Robert T. Lwongo
SIGNATURE OF COMPLAINANT

DEFENDANT IDENTIFICATION INFORMATION — Complete data below if known.

DATE OF BIRTH	PLACE OF BIRTH	SOCIAL SECURITY NUMBER	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
04/21/62	Greensborough NC.	021548744	M	BN	5'11"	160	brn	blk

OCCUPATION	EMPLOYER/SCHOOL	MOTHER'S NAME (MAIDEN)	FATHER'S NAME
Unem.	N/A	Shepard	Robert.

COURT USE ONLY

DATE	DISPOSITION	AUTHORIZED BY
	NO PROCESS TO ISSUE ☐ At request of complainant ☐ Complainant failed to prosecute ☐ Insufficient evidence having been presented	
7/18/91	PROCESS TO ISSUE ☒ Sufficient evidence presented ☐ Defendant failed to appear TYPE OF PROCESS ☐ Warrant ☐ Summons returnable 25 OCT ☐ Continued to _____	9 Clerk-Magistrate

COMMENTS

1. District	2. Complaint No.	BOSTON POLICE DEPARTMENT CONTINUATION SHEET	Page	of
B-3	115973845		2	2
3. Report Date	4. Nature of Incident	Remarks:		
07/18/91	C/E Daytime	had been broken in exposing inside door lock. Officers		

entered Apt. And observed in living room, Areas where V.C.R. And phone were taken from. Officers also observed in bedroom one pink pillowcase missing from pillow sheets and pillowcases in bedroom were all pink in color. Messages played back from ans. machine tape in name of Monica Collins. Officers also spoke to Ms Lugay who stated she observed s/p leaving 258 Norwell St. carrying the pink pillowcase. S/p placed under Arrest, Mat. rights, transported to B-3 for booking. Apt secured by officers. Ms Shepherd will watch Apt. And notify owner upon her return home.

I HEREBY CERTIFY THAT THIS IS A TRUE COPY GIVEN UNDER MY HAND AND SEAL THIS 7th DAY OF October 1999

Paul F. Ferrone
ASSISTANT CLERK

BOSTON POLICE DEPARTMENT
ARREST BOOKING SHEET

31. District: B-3 | 32. Cell No.: C

03. Booking Number: 20017 | 04. Complaint No.: 11597345 | 05. Central Records No.: | 06. Date: 07-18-91 | 07. Arrest Time: 9:45

38. Booking Charges: B&E DAY-time

09. Location of Arrest: 10 Hartwell St. Dorm | 10. Additional Clearances (CC Numbers):

11. Name (Last, First, MI): Shepard, Reginald | 12. Address: 9 Weaver Way Roxbury, ma

13. Alias | 14. Sex: M | 15. Race: BN | 16. Age: 29 | 17. DOB: 04-21-62 | 18. Place of Birth: Greensboro, N.C.

19. Mother's First Name: Robert Ann | 20. Mother's Maiden Name: Shepard | 21. Wife's Full Maiden Name: | 22. Husband's First Name:

23. Height: 5'11 | 24. Weight: 160 | 25. Hair: Blk | 26. Eyes: Brn | 27. Build: med | 28. Complexion: DK Brn | 29. Married | 30. Occupation: unemployed | 31. Soc. Sec. No.: 021548744

32. Scars, Marks, Other Descriptive Data: light mustache Blue shirt Red short, white socks | Op. License No.:

33. Arrested With (Booking Numbers and Names): #1 n/a | #2 | 34. Others: ☐ Yes (See Incid. Rpt.)

35. Arresting Officer: Anderson / Luongo | 36. Unit of Arrest Off.: B10D | 37. ID No.: 7891 | 38. Partner's ID: 10279

39. Transported By (Unit): B10D | 40. Booking Officer / Signature: Paul Cochrane | 41. ID No.: 7897 | 42. Time: 10:30

43. Searched By: Anderson | 44. ID No.: 7891 | 45. Placed in Cell By: Cochrane | 46. ID No.: 7397

47. Arrest Process: ☐ No Warrant ☐ Summons | Warrant No. | Court

48. I was informed of my right to remain silent to use a phone/to call a lawyer or to have one provided to me. | 49. Phone Used: ☐ Yes

Signature: X Reginald Shepard

50. Interviewed / Rights Given / Signature: Paul Cochrane (Anderson #7891) | 51. ID No.: 7397 | 52. Time: 10:30

53. Visible Injuries: None | Examined at Hospital: ☐ Yes ☐ No | 54. Property Other: 2 Rings, Strings | Money: $ $.15 IN Change

X Reginald Shepard

55. Vehicle (Reg. State, Number): | 56. Disposition:

Signature of Prisoner: X Reginald Shepard

ID: 57. ID Process ☐ Yes ☐ No | 58. Photo No. | 59. Teletype No. | 60. Breathalyzer ☐ Yes ☐ No | 61. Wanted ☐ Yes ☐ No | 62. Warrant No. | Court Jurisdiction | 63. ID of Notifying Off.

JUVENILE: 64. Person Notified | 65. Relationship | 66. Address | 67. Phone | 68. Date | 69. Time

70. Notified By | 71. ID No. | 72. Name of Juv. Prob. Officer | 73. Juvenile Paroled To

74. Additional Information:

I ARREST CERTIFY THAT THIS IS A TRUE COPY, GIVEN UNDER MY HAND AND SEAL OF OFFICE THIS 5TH DAY OF OCTOBER 1991
CLERK-MAGISTRATE / ASSISTANT CLERK

OUT: 75. Prisoner Transferred To | 76. Pris. Prop. Received By: | 77. ID No. | Property Listed Under Item 54 | Signature

79. Bail Set By | 80. Bailed By | 81. Amount | ☐ Released Bail Comm. Signature | 83. Date Time Released

COURT: 84. Court Charges (Major Charge First): B&E Day time | 85. Code | 86. Disposition | 87. Court: Dor Ct | 88. Date in Court: 07-18-91

BPD Form 21

HEADQUARTERS RECORDS

Boston Police
INCIDENT REPORT

HANDPRINT

ORIGINAL ☑ SUPPLEMENTARY ☐

01. KEY SITUATIONS: ☐ DRUGS ☐ LICENSED PREMISES ☐ ELDERLY ☐ JUVENILE ☐ COMMUNITY DISORDERS ☐ DOMESTIC ☐ OTHER | 02. COMPLAINT NO.: 11599345 | 03. REPORT DIST.: B-3 | CLEARANCE DIST. | PAGE: 1 OF 2

04. TYPE OF INCIDENT: B/E Daytime | 05. CRIME CODE | 06. STATUS ☐ INACTIVE ☐ UNFOUNDED ☐ CLEARED BY ARREST ☐ UNDER 18 ☐ EXCEPT CL ☐ UNDER 18 | 07. DATE OF OCCUR.: 07/18/91 A / B

08. LOCATION OF INCIDENT (NO., STREET; INTERSECTION; ALPHA ORDER): 256 Hartwell ST. Dorchester | APT.: 2 | 09. DISPATCH TIME: 9:58 A / P | 10. TIME OF OCCUR: A 9:28 / P | A ☐ / B ☐

11. VICTIM-COMP. (LAST, FIRST, MI): Collins, Monica A | 12. PHONE | 13. SEX: F | 14. RACE: B | 15. MARITAL STATUS ☐ MARRIED ☐ UNMARRIED

16. ADDRESS (NO., STREET, CITY AND STATE IF OTHER THAN BOSTON OR MASS.): 256 Hartwell ST. Dorchester | APT.: 2 | OCCUPATION | 17. AGE | 18. DOB

19. PERSON REPORTING IF DIFFERENT THAN ABOVE: | 20. ADDRESS | APT. | 21. PHONE

22. WAS THERE A WITNESS TO THE CRIME

PERSON INTERVIEWED	AGE	LOCATION OF INTERVIEW	APT NO.	HOME ADDRESS	APT	TEL	
Aletha Lugay		Scene		251 Hartwell ST		288-8316	RES / BUS
Sharon Shepard		Scene		258 Hartwell ST		825-8656	RES / BUS
							RES / BUS

A ☑ YES ☐ NO

23. NUMBER OF PERPETRATORS: One | CAN SUSPECT BE IDENTIFIED AT THIS TIME? B ☑ YES ☐ NO

PERSONS

24. ☒ ARREST ☐ MISSING ☐ SUSPECT ☐ WARRANT ☐ SUMMONS	25. NAME (LAST, FIRST, MI): Shepard, Reginald	26. SS NO.: 021548744	27. BOOKING NO.: 20017	28. PHOTO NO.: N/A	29. ALIAS: N/A
30. WARRANT NO.: N/A	31. ADDRESS: 9 Weaver Way, Roxbury	32. SEX: M / F	33. RACE: BN	34. AGE: 29	35. HEIGHT: 511"	36. DOB: 04-21-62

37. SPECIAL CHARACTERISTICS (INCLUDING CLOTHING): Blue Shirt, red Shorts | 38. WEIGHT: 160 | 39. BUILD: med | 40. HAIR: blk | 41. EYES: brn

G ☐ YES ☑ NO

42. CAN SUSPECT VEHICLE BE DESCRIBED?

VEHICLES

43. ☐ STOLEN ☐ RECOV ☐ LV. SCENE ☐ ABAND ☐ IN CUST ☐ TOWED ☐ USED IN CRIME ☐ OTHER	44. REG. STATE NO.	45. PLATE TYPE	46. REG. EXP. YR.
47. VEHICLE MAKE-YEAR: N/A	48. VEHICLE NO.	49. STYLE	50. COLOR (TOP-BOTTOM)
51. OPERATOR'S NAME	52. LICENSE NO.	53. OPERATOR'S ADDRESS	
54. OWNER'S NAME	55. OWNER'S ADDRESS		

I ARREST CERTIFY THAT THIS IS A TRUE COPY, GIVEN UNDER MY HAND AND SEAL OF OFFICE THIS 5TH DAY OF OCTOBER 1991
CLERK-MAGISTRATE / ASSISTANT CLERK

56. CAN PROPERTY BE IDENTIFIED? D ☑ YES ☐ NO

PROPERTY

57. TYPE OF PROPERTY	58. SERIAL OR I.D. NUMBER	59. BRAND NAME DESCRIPTION	60. MODEL	61. VALUE	62. RECOV.	63. RECD.
phone/Answ machine	903308S	ATT	1824	unk	-	yes
VCR	T34174BB10	Fisher	FVH 4550	unk	-	yes
Mens Clothing	N/A	N/A	N/A	unk	-	yes

E ☑ YES ☐ NO

64. IS THERE A SIGNIFICANT M.O.?

M.O.

65. TYPE OF WEAPON/TOOL: N/A	66. NEIGHBORHOOD: Residential	67. TYPE OF BUILDING: 3 family	68. PLACE OF ENTRY: front door
69. WEATHER: Clear	70. LIGHTING: Artyficial	71. TRANSPORTATION OF SUSPECT (CAR, FOOT, MBTA, ETC.): foot	72. VICTIM'S ACTIVITY: At work
73. UNUSUAL ACTIONS AND STATEMENTS OF PERPETRATOR: N/A			RELATIONSHIP TO VICTIM: N/A

F ☑ YES ☐ NO

74. IS THERE ANY PHYSICAL EVIDENCE (DESCRIPTION AND DISPOSITION IN NARRATIVE)?

G ☑ YES ☐ NO

75. IS THERE ANY OTHER REASON FOR FURTHER INVESTIGATION (REASON BELOW)?

76. NARRATIVE AND ADDITIONAL INFORMATION

About 9:33 AM officers Luongo / Anderson (B10D) responded to a radio call for an B/P wearing red shorts and blue shirt in the hallway of 256 Hartwell St.

Upon arrival observed S/P (described above) walking away from above address S/P carrying a pink pillowcase. Officers ordered S/P to conduct investigation. Found pillowcase to contain property listed above. Officers returned to 256 Hartwell and spoke to Ms. Shepard who stated S/P (her son) to gain entry to bldg, stated he wanted to visit friend on 2nd floor. At this time S/P had no bag with him. Officers checked bldg and found A parcel on 3rd floor front door

SOLVABILITY FACTOR

77. UNIT ASSIGNED: B10D	78. TOUR OF DUTY: 2	79. REPORTING OFFICER'S SIGNATURE: Robert T. Luongo	80. REPORTING OFFICER'S ID: 10279	81. OTHER'S ID: 7891	OVER DN.
82. DATE OF REPORT: 07/18/91	83. SPECIAL UNITS NOTIFIED / REPORTING:				SUPERVISOR
84. TIME COMPLETED: 11:00 A / P	85. SIGNATURE OF PATROL SUPERVISOR	86. INIT. SUP.	87. ACTIVITY SUPERVISOR		

DOCKET

9407 CR 00559 a

COURT DIVISION: DORCHESTER

NAME, ADDRESS AND ZIP CODE OF DEFENDANT

CC#41087022

Reginald Shepard
9 Weaver Way
Roxbury, MA

DEF. DOB AND SEX: 4/21/62

OFFENSE CODE(S): 210/508

DATE OF OFFENSE: 2/3/94

PLACE OF OFFENSE: 145 Gallivan Blvd.

COMPLAINANT: G. Frias

POLICE DEPARTMENT (if applicable): B-3

DATE OF COMPLAINT: 2/4/94

RETURN DATE AND TIME: Arrest

Waived
Retained
Assigned

TERMS OF RELEASE: 5000 Cash

DATE	PROCEEDING
2 04 94	Arraigned before J. DOLAN
	Advised of right to counsel
	Advised of right to drug exam
	Advised of right to bail review
	Advised of right to F.I. Jury Trial
	Waives Requests F.I. Jury Trial
	Advised of alien rights
4-20 94	Warrant issued Default warrant issued
	Default removed Warrant recalled
8-19 94	Warrant issued Default warrant issued
8 23 95	Default removed Warrant recalled

COUNT OFFENSE: a) .B&E DAY TIME, INT. TO COMMIT A FELONY c266 s18

FINE	SURFINE	COSTS	TOTAL DUE
PSF 6 mos			

DATE: 4-20-94

PLEA: Not Guilty / Guilty / Nolo / New Plea / ✓ Admits suff. facts

FINDING: GUILTY

JUDGE: Buckley

IMPRISONMENT AND OTHER DISPOSITION: 6 DAYS Credit
2 1/2 HC 6 mos Cont'd 6 mos 18 mos SS 4/20/

Cont. w/o finding until

Appeal of find. & disp / Appeal of disp

FINAL DISPOSITION: DATE
Discharged from probation
Dismissed at request of probation

COUNT OFFENSE: b) .MAL. DESTRUCTION OF PROP. OVER $250 c266 s127

FINE	SURFINE	COSTS	TOTAL DUE

DATE: 10-20-94

PLEA: Not Guilty / Guilty / Nolo / New Plea / ✓ Admits suff. facts

FINDING: GUILTY

JUDGE: Buckley

IMPRISONMENT AND OTHER DISPOSITION: Clinic w/A

Cont. w/o finding until

Appeal of find. & disp / Appeal of disp

FINAL DISPOSITION: DATE
Discharged from probation
Dismissed at request of probation

COUNT OFFENSE

FINE	SURFINE	COSTS	TOTAL DUE

DATE

PLEA: Not Guilty / Guilty / Nolo / New Plea / Admits suff. facts

FINDING

JUDGE

IMPRISONMENT AND OTHER DISPOSITION

I HEREBY CERTIFY THAT THIS IS A TRUE COPY, GIVEN UNDER MY HAND AND SEAL THIS 5TH DAY OF October 1994.

Paul G. Perrin
CLERK-MAGISTRATE
ASSISTANT CLERK

Cont. w/o finding until

Appeal of find. & disp / Appeal of disp

FINAL DISPOSITION: DATE
Discharged from probation
Dismissed at request of probation

COUNT OFFENSE

FINE	SURFINE	COSTS	TOTAL DUE

DATE

PLEA: Not Guilty / Guilty / Nolo / New Plea / Admits suff. facts

FINDING

JUDGE

IMPRISONMENT AND OTHER DISPOSITION

DEPORTATION WARNING GIVEN

Cont. w/o finding until

Appeal of find. & disp / Appeal of disp

FINAL DISPOSITION: DATE
Discharged from probation
Dismissed at request of probation

CONT TO	PURPOSE	CONT TO	PURPOSE
3 8 94	PTH	8-2-95	Motion
4-20-94	TRIAL	8/16/95	Clinic
3-6-95	Motion	8/23/95	SJC
6-15-95	PTH	9/20/95	SJC

DATE	TAPE NO	START	STOP
2-4-94	1397	3004	
2-4-94	1619	1258	1651
10-20-94	1675	0 —	613
8-23-95	1302	1957	2074

COURT DIVISION: DORCHESTER

NAME, ADDRESS AND ZIP CODE OF DEFENDANT

CC#41087022

Reginald Shepard
9 Weaver Way
Roxbury, MA

DEF. DOB AND SEX: 4/21/62

OFFENSE CODE(S): 210/508

DATE OF OFFENSE: 2/3/94

PLACE OF OFFENSE: 145 Gallivan Blvd.

COMPLAINANT: G. Frias

POLICE DEPARTMENT (if applicable): B-3

DATE OF COMPLAINT: 2/4/94

RETURN DATE AND TIME: Arrest

District Court Department

TO ANY JUSTICE OR CLERK-MAGISTRATE OF THE DISTRICT COURT DEPARTMENT:

The within named and undersigned complainant, behalf of the Commonwealth, on oath complains that the date and at the location stated herein the defend. did commit the offense(s) listed below.

COUNT OFFENSE: a) .B&E DAY TIME, INT. TO COMMIT A FELONY c266 s18

did break and enter in the day time the building, ship or motor vehicle or vessel of Russell McGaugh with intent to commit a felony therein, in violation of G.L. c.266, s.18.

COUNT OFFENSE: b) .MAL. DESTRUCTION OF PROP. OVER $250 c266 s127

did wilfully and maliciously destroy or injure the personal property, dwelling house, or building of Russell McGaugh, the value of the property so destroyed or injured exceedin two hundred and fifty dollars, in violation of G.L. c.266, s.127.

COUNT OFFENSE

I HEREBY CERTIFY THAT THIS IS A TRUE COPY, GIVEN UNDER MY HAND AND SEAL THIS 5TH DAY OF October 1994.

Paul G. Perrin
CLERK-MAGISTRATE
ASSISTANT CLERK

COUNT OFFENSE

COMPLAINANT	SWORN TO BEFORE CLERK-MAGISTRATE/ASST. CLERK	ON (DATE)	ADDITIONAL COUNTS ATTACHED
x Bonita Howard	x James T. Buckley	2/4/94	

FIRST JUSTICE: Hon. James W. Dolan

COURT ADDRESS: 510 Washington Street, Dorchester, MA 02124

A TRUE COPY — CLERK-MAGISTRATE/ASST CLERK — ON (DATE)

APPLICATION FOR COMPLAINT ☐ JUVENILE | 94 CR 00559 | **District Court Department**

☒ ARREST ☐ HEARING ☐ SUMMONS ☐ WARRANT

The within named complainant requests that a complaint issue against the within named defendant, charging said defendant with the offense(s) listed below.

COURT DIVISION: Dorchester District Court, 510 Washington Street, Dorchester, MA. 02124

DATE OF APPLICATION	DATE OF OFFENSE	PLACE OF OFFENSE
2-3-94	2-3-94	145 Gallivan Blvd

NAME OF COMPLAINANT: G. Frias

ADDRESS AND ZIP CODE OF COMPLAINANT: 1165 Bluehill Ave, Dorch, mass

NAME, ADDRESS AND ZIP CODE OF DEFENDANT: Reginald Shepard, 9 Weaver Way, Rox

NO	OFFENSE	G.L. Ch. and
1	Breaking & Entering $10	
2	Wilful malicious destruction of personal property. $0	
3		
4		

COURT USE ONLY → A hearing upon this complaint application will be held at the above court address on | DATE OF HEARING | TIME OF HEARING AT | COURT USE ONLY →

CASE PARTICULARS — BE SPECIFIC

NO	NAME OF VICTIM Owner of property, person assaulted, etc	DESCRIPTION OF PROPERTY Goods stolen, what destroyed, etc	VALUE OR PROPERTY Over or under $250	TYPE OF CONTROLLED SUBSTANCE OR WEAPON Marijuana, gun, etc
1	Russell McGough	Rear door	over	N/A
2				
3				
4				

I HEREBY CERTIFY THAT THIS IS A TRUE COPY, GIVEN UNDER MY HAND AND SEAL THIS 5th DAY OF October 1994

Paul B. Fermin
CLERK MAGISTRATE
ASSISTANT CLERK

OTHER REMARKS: Recds to CC# 41085022

x Gladys Frias
SIGNATURE OF COMPLAINANT

DEFENDANT IDENTIFICATION INFORMATION — Complete data below if known.

DATE OF BIRTH	PLACE OF BIRTH	SOCIAL SECURITY NUMBER	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
4-21-62	N. Carolina	021-54-8744	M	BN	5'10"	156	Brn	Bl

OCCUPATION	EMPLOYER/SCHOOL	MOTHER'S NAME (MAIDEN)	FATHER'S NAME
Unemployed		Ann Shepard	Robert

COURT USE ONLY

DATE	DISPOSITION	AUTHORIZED B
	NO PROCESS TO ISSUE: At request of complainant; Complainant failed to prosecute; Insufficient evidence having been presented	
2/4/94	PROCESS TO ISSUE: Sufficient evidence presented; Defendant failed to appear. TYPE OF PROCESS: Warrant; Summons returnable Arrest.	JCM
	Continued to _____	

COMMENTS

41085022 | B-3 | B-3 | 1 | 1

04 TYPE OF INCIDENT: Breaking & Entering | 05 CRIME CODE | 06 STATUS: ☐ INACTIVE ☐ UNFOUNDED ☐ ARREST ☐ UNDER 18 ☐ EXCEPT CL ☐ UNDER 18 | 07 DATE OF OCCUR: 2-3-94

08 LOCATION OF INCIDENT (NO. STREET, INTERSECTION OR LOCATION): 145 Gallivan Blvd Dorch | APT | 09 DISPATCH TIME: 12:50 | 10 TIME OF OCCUR: 12:45

11 VICTIM'S NAME (LAST, FIRST, MI): McGough Russell | 12 PHONE | 13 SEX ☐M ☐F | 14 RACE | 15 MARITAL STATUS ☐ MARRIED ☐ UNMARRIED

16 ADDRESS (NO. STREET, CITY AND STATE IF OTHER THAN BOSTON OR MASS.): Same | APT | OCCUPATION | 17 AGE | 18 D.O.B.

19 PERSON REPORTING (IF DIFFERENT THAN ABOVE): G. Frias | 20 ADDRESS: 1165 Bluehill Ave Matt | 21 PHONE: 343-470

22 WAS THERE A WITNESS TO THE CRIME?

PERSON INTERVIEWED	AGE	LOCATION OF INTERVIEW	APT NO.	HOME ADDRESS	APT	
Tohiko Quinn				141 Gallivan Blvd.		298-1534

A ☐ YES ☐ NO

23 NUMBER OF PERPETRATORS: One | CAN SUSPECT BE IDENTIFIED AT THIS TIME? | B ☐ YES ☐ NO

PERSONS

24 ☒ ARREST ☐ WARRANT ☐ MISSING ☐ SUSPECT ☐ SUMMONS | 25 NAME (LAST, FIRST, MI): Shepard, Reginald | 26 S.S. NO. | 27 BOOKING NO. | 28 PHOTO NO. | 29 ALIAS

30 WARRANT NO. | 31 ADDRESS: 9 Weaver Way, Rox | 32 SEX M | 33 RACE BM | 34 AGE 31 | 35 HEIGHT 5'10" | 36 D.O.B. 4-21-62

37 SPECIAL CHARACTERISTICS (INCLUDE CLOTHING): Brown leather jacket & Blk pants. | 38 WEIGHT 156 | 39 BUILD MED | 40 HAIR BLK | 41 EYES Brn | C ☐ YES ☐ NO

42 CAN SUSPECT VEHICLE BE DESCRIBED?

VEHICLES

43 ☐ STOLEN ☐ RECOV. ☐ LV. SCENE ☐ ABAND. ☐ IN CUST. ☐ TOWED ☐ USED IN CRIME ☐ OTHER: N/A | 44 REG. STATE NO. | 45 PLATE TYPE | YEAR (EXP.) | 46 MODEL

47 VEHICLE MAKE YEAR | 48 VEHICLE NO. | 49 STYLE | 50 COLOR (TOP/BOTTOM)

51 OPERATOR'S NAME | 52 LICENSE NO. | 53 OPERATOR'S ADDRESS

54 OWNER'S NAME | 55 OWNER'S ADDRESS

D ☐ YES ☐ NO

56 CAN PROPERTY BE IDENTIFIED?

PROPERTY

57 TYPE OF WEAPON/TOOL	58 SERIAL # / IDENTI GUARD NO.	59 BRAND NAME (MAKE, MODEL)	60 MODEL	61 VALUE	62 UCR	63 RECOV.
Rear Basement door				UNK		N/A

E ☐ YES ☐ NO

64 IS THERE A SIGNIFICANT M.O.?

M.O.

65 TYPE OF WEAPON/TOOL	66 METHOD USED	67 TYPE OF BUILDING	68 PLACE OF ENTRY
UNK	Kicked	Single family	Rear door

69 WEATHER	70 LIGHTING	71 TRANSPORTATION OF SUSPECT (CAR, FOOT, MBTA, ETC.)	72 VICTIM'S ACTIVITY
Clear	Nat	Foot	UNK

73 UNUSUAL ACTIONS AND STATEMENTS OF PERPETRATOR | RELATIONSHIP TO VICTIM: N/A

F ☐ YES ☐ NO

74 IS THERE ANY PHYSICAL EVIDENCE (DESCRIPTION AND DISPOSITION IN NARRATIVE)?

G ☐ YES ☐ NO

75 IS THERE ANY OTHER REASON FOR FURTHER INVESTIGATION (REASON BELOW)?

BLOCK NO.

76 NARRATIVE AND ADDITIONAL INFORMATION:

About 12:50pm PDS Frias & Court responded to a B/E for a Black Male going Door to Door asking for an UNK Person on Arrival Witness listed above stated to the Officer that Suspect described above rang her door bell. When witness answered the door Suspect asked her - "Is Pauline here"? Victim answered there is no Pauline here. Suspect then went next door to #145 Gallivan & was observed by the witness attempting to gain entry by turning several door knobs at this time Officer Frias went to the rear for the property and Suspect was observed with both arms through the Glass

INVESTIGATION AVAILABILITY CYCLE

77 OFFICER ASSIGNED	78 TOUR OF DUTY	79 REPORTING OFFICER (SIGNATURE)	80 REPORTING OFFICER'S ID	81 PARTNER'S ID	P.I. ☐ YES ☐ NO
B4727	2	Gladys Frias	6983		

82 DATE REPORTED	83 SPECIAL UNITS NOTIFIED (INCLUDING)	TELEPHONE NO.
2-3-94		

84 TIME COMPLETED | 85 SIGNATURE OF PATROL SUPERVISOR | 86 PAT SUP ID | 87 SIGNATURE DUTY SUPERVISOR | 88 DUTY SUP ID

BPD Form 1.1 Revised 85

HEADQUARTERS COPY

1. District	2. Complaint No.	BOSTON POLICE DEPARTMENT CONTINUATION SHEET	Page	of
B-3	41087022		2	2
3. Report Date	4. Nature of Incident	Remarks		
7944	41087022			

Partition. (Glass to door was Shattered)
Attempting to gain entry to the Second door (Rear Basement) Officer put a description of Suspect over the air. at this time Suspect looked to his right and saw officer Frias Suspect then ran and jumped over the rear fence. Officers Searched the area for the Suspect, where he was apprehended after a Foot pursuit by the V740 officer Scangello and officer Gomperts. On Old morton Street. Suspect arrested advised of his Rights & transported to B-3 Sta Booking. Damage to property at 145 Gallivan Blvd. Rear Basement door. Glass to door. Metal Crate, and door Knob. Owner of property not home at this time.

PAUL F. THAYER
NOTARY PUBLIC
COMMONWEALTH OF MASS.
MY COMMISSION EXPIRES OCT. 21, 1994

Paul F. Thayer

BPD Form 111

HEADQUARTERS RECORDS

HAND PRINT

BOSTON POLICE DEPARTMENT
ARREST BOOKING SHEET

01. District		02. Call No.
B-3		6

03. Booking Number	04. Complaint No.	05. Central Records No.	06. Date	07. Arrest Time
02345	41087022		02-03-94	1300

08. Booking Charges: B+E Willful Malicious destruction of property

09. Location of Arrest: 145 GALLIVAN

10. Additional Clearances (CC Numbers):

ARRESTEE

11. Name (Last, First, MI)	12. Address	
SHEPARD, REGNALD	9 WEAVER WAY	ROX.

13. Alias	14. Sex	15. Race	16. Age	17. DOB	18. Place of Birth
	M F	B	31	4-21-62	N. CAROLINA

19. Parents First Names	20. Mother's Maiden Name	21. Wife's Full Maiden Name	22. Husband's First Name
ANN / ROBERT	SHEPARD		

23. Height	24. Weight	25. Hair	26. Eyes	27. Build	28. Complexion	29. Marital	30. Occupation	31. Soc. Sec. No.
5'10"	156	BLK	BRN	MED	MED	☐ Mar. ☒ Unmar.	UNEMPLOYED	021-54-8745

32. Scars, Marks, Other Descriptive Data: SCAR on STOMACH, MUSTACHE & GOATEE
Op. License No.

33. Arrested With (Booking Numbers and Names): #1 #2
34. Others: ☐ Yes (See Incid. Rpt.) ☐

35. Arresting Officer	36. Unit of Arrest Off.	37. ID No.	38. Partner's ID
L. FRIAS	B4720	8987	

39. Transported By (Unit)	40. Booking Officer Signature	41. ID No.	42. Time
B202D	E Thomas	7365	1:39

43. Searched By	44. ID No.	45. Placed in Cell By	46. ID No.
J. Thompson	9385	E Thomas	7365

47. Arrest Process: ☐ No Warrant ☐ Summons | Warrant No. | Court

CONTROL

48. I was informed of my right to remain silent, to use a phone, to get a lawyer, or to have one provided for me.
Signature: X Reginald Shepard
49. Phone Used: ☒ Yes ☐

50. Informed of Rights By
Signature: E Thomas
51. ID No. 7365
52. Time 1:54

53. Visible Injuries: Examined at Hospital ☐ Yes ☐ No

54. Property: Other:
1 SET GLASSES
1. BROWN BELT
1. SET OF KEYS
1. CHAP-ET
1. CAP.
NIGHTS 10 Ø
Paul F. Thayer

X Reginald Shepard
Signature of Prisoner: X Reginald Shepard

55. Vehicle (Reg. State, Number)
56. Disposition

ID

57. ID Process ☐ Yes ☐ No | 58. Photo No. | 59. Teletype No. | 60. Breathalyzer ☐ Yes ☐ No | 61. Wanted ☐ Yes ☐ No | 62. Warrant No. | Court/Jurisdiction | 63. ID of Notifying Off.

JUVENILE

64. Person Notified	65. Relationship	66. Address	67. Phone	68. Date	69. Time

70. Notified By	71. ID No.	72. Name of Juv. Prob. Officer	73. Juvenile Paroled To

74. Additional Information:

OUT

75. Prisoner Transferred To	76. Pris. Prop. Received By	77. ID No.	78. I Received Property Listed Under Item 54. Signature

79. Bail Set By	80. Bailed By	81. Amount	82. I Selected Bail Comm. Signature	83. Date/Time Released

COURT

84. Court Charges (Major Charge First)	85. Code	86. Disposition	87. Court	88. Date in Court
B+E			DOR	02-04-94

BPD Form 211

Supreme Court, U.S.
FILED
SEP - 1 2004
OFFICE OF THE CLERK

(1)

No. 03-9168

IN THE

Supreme Court of the United States

REGINALD SHEPARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE PETITIONER

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August 27, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

The Armed Career Criminal Act [18 U.S.C. § 924(e)] imposes a mandatory minimum sentence of 15 years imprisonment for a person convicted of being a felon in possession of a firearm [18 U.S.C. § 922(g)] where that person has previously been convicted of three violent felonies or serious drug offenses or both. *Taylor v. United States*, 495 U.S. 575 (1990) held that Congress intended a sentencing court to employ a categorical approach to determine whether a defendant's prior convictions qualify as predicates for this sentence enhancement, looking only to the fact of conviction and the elements of the statute of conviction, or to the charging document and the jury instructions to determine whether all of the elements of generic burglary (an enumerated violent felony) were necessarily adjudicated in the state court. The questions presented are:

1. Whether, where the defendant has pleaded guilty to a non-generic charge of burglary brought under a non-generic statute, there is no contemporaneous record of the guilty plea proceedings and the judgment of conviction reflects a general finding of guilty, the sentencing court is still bound by *Taylor*'s categorical method of application or may instead be required to conduct an inquiry – including an evidentiary hearing – into the facts underlying the conviction, to determine whether, in the guilty plea proceeding, both the defendant and the government believed the generic burglary was at issue?

2. If so, whether the sentencing court may be required to consider a version of these underlying facts found in any document in the court file such as an investigative police report or a complaint application and, if the facts alleged in the document are not challenged by the defendant, regard them as sufficiently reliable evidence that the defendant was convicted of a crime including all of the elements of generic burglary to support an Armed Career Criminal Act enhancement?

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OPINIONS BELOW

The first opinion of the United States Court of Appeals for the First Circuit is published at 231 F.3d 56 (1st Cir. 2000) and is reproduced in the Joint Appendix at 67. The first district court opinion is reported at 125 F. Supp. 2d 562 (D. Mass. 2000) and is reproduced in the Joint Appendix at 46. The second opinion of the United States Court of Appeals for the First Circuit is published at 348 F.3d 308 (1st Cir. 2003) and is reproduced in the Joint Appendix at 172. The second district court opinion is reported at 181 F. Supp. 2d 14 (D. Mass. 2002) and is reproduced in the Joint Appendix at 146.

STATEMENT OF JURISDICTION

The judgement of the First Circuit Court of Appeals was entered on November 3, 2003. Petitioner's request for rehearing and suggestion for rehearing en banc was denied on November 24, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation.

Section 922 of Title 18 of the United States Code provides in relevant part:

> (g) it shall be unlawful for any person –
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . .
> >
> > to ship or transport an interstate or foreign commerce, or possess in or effecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 924 of Title 18 of the United States Code provides in relevant part:

> (e)(1) in the case of a person who violates Section 922(g) of this title and has previous convictions by any court referred to in Section 922(g)(1) of this title for a violent felony . . . such person shall be fined under this title and imprisoned not less than 15 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under Section 922(g).

Section 3553 of Title 18 of the United States Code provides in relevant part:

> (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The Court, in determining the particular sentence to be imposed, shall consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant
>
> (2) the need for the sentence imposed:
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for:
>
> > (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines:
> >
> > > (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under Section 994(p) of title 28); and
> > >
> > > (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement:

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

The issue in this case is whether federal sentencing courts may conduct wide-ranging inquiries into facts underlying a prior conviction in order to determine whether that conviction qualifies as a predicate offense under the Armed Career Criminal Act (18 U.S.C. § 924(e)). The Court previously

resolved this precise issue in *Taylor* v. *United States*, 495 U.S. 575 (1990). Pursuant to *Taylor*, which itself involved a guilty plea, federal courts considering ACCA enhancements based upon prior state convictions may look only the statute of conviction in order to determine whether those prior offenses qualify as "violent felonies." In cases where the previous conviction followed a jury trial, *Taylor* specifies that the sentencing court may look to the charge and the jury instructions to determine whether the adjudicated elements qualify that conviction as a violent felony and therefore an ACCA predicate offense.

The District Court here, relying upon *Taylor*, twice refused to impose the ACCA enhancement. That enhancement would have extended petitioner's sentence from a maximum of ten years for his federal felon-in-possession charge, to a mandatory minimum of fifteen years with a maximum of life in prison. The First Circuit twice reversed the District Court, ultimately ordering the District Court to impose the ACCA enhancement. The First Circuit's opinions take impermissible liberties with *Taylor*'s holding, raise grave constitutional questions in the wake of *Jones v. United* States 526 U.S. 227 (1999). *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), and make manifest the same inefficiencies and inequities that *Taylor* sought to avoid.

The District Court imposed and reaffirmed its sentence after careful consideration of the factors set forth in 18 U.S.C. § 3553(a), including the nature and circumstances of the offense and the history and characteristics of the petitioner. On that basis, the District Court departed upwards to reflect the seriousness of the petitioner's prior criminal history. For petitioner, who has completed service of 46 months in prison, that sentence has proved successful under the factors specified in 18 U.S.C. § 3553(a)(2), including protection of the public, deterrence, and access to needed drug treatment. The First Circuit's rulings would unjustifiably and broadly

expand the imposition of extensive mandatory minimum terms in cases like those of petitioner, who would be reincarcerated for a period of no less than 10 additional years. Because this expansion is wholly unjustified, reversal is warranted.

A. Statutory Background

Under 18 U.S.C. § 922(g)(1), it is unlawful for a person who has previously been convicted of a felony to possess a firearm. The maximum sentence of imprisonment for a violation of § 922(g)(1) is ten years. *Id.* § 924(a)(2). A defendant, convicted for a violation of § 922(g)(1) may, however, be subject to the sentence enhancement provision of the Armed Career Criminal Act ("ACCA"). 18 U.S.C. § 924(e). Under the ACCA, a person convicted of being a felon in possession of a firearm is subject to a mandatory minimum prison sentence of fifteen years if he has "three previous convictions by any court . . . for a violent felony or serious drug offense." *Id.* Section 924(e) specifies no maximum sentence. Under the ACCA, the term "violent felony" means any crime punishable by a term of imprisonment exceeding one year and, *inter alia*, "is burglary." *Id.* § 924(e)(2)(B)(ii).

> [A] person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of [1] unlawful or unprivileged entry into, or remaining in, [2] a building or structure, [3] with intent to commit a crime.

Taylor, 495 U.S. at 599[1]. These are the elements of the offense of "generic" burglary. *Id.*

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[1] *See also* United States Sentencing Guidelines § 4B1.4, Application Note

B. Factual Background

At the behest of a cooperating witness, petitioner Reginald Shepard sold a firearm and ammunition to an undercover ATF agent in October 1995. Petitioner was indicted in September 1998 for a violation of § 922(g)(1). Petitioner, who was detained pending trial, pleaded guilty to the one count indictment on March 3, 1999. On January 20, 2003, the district court rejected the government's request to apply the ACCA, and sentenced petitioner to 46 months in prison followed by three years of supervised release.

The District Court based its discretionary sentence on extensive findings about petitioner's personal background and criminal history. The court noted that, while petitioner had an extensive criminal history which included several convictions for breaking and entering, beginning when he was eighteen years old, his crimes where those of a desperate addict. *See United States v. Shepard*, 125 F. Supp. 2d 562, 564-65 (D. Mass. 2000) ("*Shepard I*"); J.A. 49-50, 65. The crimes were opportunistic and unplanned, had little chance of success and resulted in immediate apprehension. *See id.*, J.A. 51. None of his prior offenses involved the use of a gun. *See id.* at 572; J.A. 64. They mostly involved "shoplifting, trespassing, motor vehicle infractions, receiving stolen property, breaking and entering." *Id.*, J.A. 51 & n.5. The root of petitioner's criminal conduct was petitioner's drug use which began at age sixteen when he moved out of his home and withdrew from school after years of witnessing his alcoholic father physically abuse his mother. *See id.*, J.A. 49-50. After his father was thrown out of the house, when Shepard was ten years old, his mother became involved with another man who continued the abuse including petitioner and his sister. *See id.*, J.A. 49. At sentencing, petitioner represented to the court that he had voluntarily stopped using drugs in 1996 and was supported in this claim by a strong showing of family and friends who appeared on his behalf. *See id.*, J.A. 50, 56.

Petitioner discharged his sentence on January 25, 2002. While imprisoned, petitioner satisfactorily completed a 500-hour drug abuse recovery program. He is currently under supervised release until January 2005. Following his release from prison, petitioner married Regina Chaves Shepard. On April 2, 2003, their daughter Aliana Shepard was born. Mrs. Shepard's six year old daughter lives with the Shepards in Boston. Both petitioner and Mrs. Shepard are employed. Petitioner, now 42 years of age, works at Consolidated Delivery & Logistics in Boston and serves in two capacities. From 4:00 p.m. until midnight he is a warehouse supervisor and from midnight to 3:00 a.m. he is a delivery driver. During the mornings, while Mrs. Shepard is at work, petitioner cares for their daughter. Add. C, Regina Shepard Aff., Appellee Reginald Shepard's Mot. for Stay of Issuance of Mandate Pending Filing of Pet. for Cert., 02-1216 (1st Cir. filed Dec. 1, 2003).

C. Opinions Below

1. Petitioner's presentence report ("PSR") recommended an offense level of 14 (prohibited person, U.S.S.G. § 2K2.1(a)(6)(A)) and a criminal history category of VI, based on 39 criminal history points. 125 F. Supp. 2d at 564, J.A. 49. The Probation Department refused to impose a sentence enhancement under the ACCA, despite prosecution objection and review of the police incident reports and complaint applications. *Id.* at 566; J.A. 52. After deducting two points from the offense level for acceptance of responsibility (*id*; U.S.S.G. § 3E1.1[a]), the PSR recommended a guideline range of 30 to 37 months. At sentencing, the parties agreed that, absent enhancement pursuant to the provisions of § 924(e), 30 to 37 months was the applicable guideline range. J.A. 18.

The PSR recounted petitioner's criminal history, including a factual description of his prior convictions for breaking and entering drawn from certified copies of incident reports and

applications for complaint taken from state court files.[2] S.J.A. 195-213. Relying upon the facts set forth in the PSR and supplemented by certified copies of police reports and complaint applications, the prosecution objected to the fact that the PSR did not calculate petitioner's sentence in accordance with the ACCA and U.S.S.G. § 4B1.4. S.J.A. 237-43. Petitioner argued that the inclusion of factual allegations drawn from incident reports and complaint applications was inappropriate, unreliable and could not be considered in light of *Taylor*, 495 U.S. at 600; *United States v. Martinez-Cortez*, 988 F.2d 1408, 1413 (5th Cir. 1993); and *United States v. Dueno*, 171 F.3d 3, 7 (1st Cir. 1999). S.J.A. 243.

At the sentencing hearing, the prosecution asserted that at least three, and as many as five, of petitioner's prior convictions for breaking and entering constituted generic burglaries and thus qualified as violent felonies under the ACCA. J.A. 21-26, 28-30. Each of these prior convictions were the result of guilty pleas to breaking and entering statutes whose terms were broader than statutory definitions of the offenses were broader than generic burglary ("nongeneric burglary").[3] The ambiguity of petitioner's prior

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[2] "Certification" indicated only that the document was an accurate copy. Such certification in no way established the actual nature of the crimes to which petitioner pled. *United States v. Shepard*, 181 F. Supp. 2d 14, 22 (D. Mass. 2002) ("*Shepard III*"), J.A. 159.

[3] Each of the convictions at issue was for violation of one of two statutes, which provide in relevant part:

> Mass.Gen.Laws ch. 266, § 16 – Breaking and entering at night
>
> Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, or who attempts to or does break, burn blow up or otherwise injures or destroys a safe, vault or other depository of money, bonds or other valuables in any building, vehicle or place, with intent to commit a larceny or felony, whether he succeeds or fails in the perpetration of such larceny or felony, shall be punished by imprisonment in the state prison for not

pleas was exacerbated by the fact that all but one of the subsequent applications for complaint were in the boilerplate language of the nongeneric statutes. Thus, it is impossible to ascertain from the state court record whether petitioner was ever charged with, much less pleaded guilty to generic burglary. At no point, during the prior state court proceedings or the federal sentencing did petitioner "concede the facts on which the government now relies." 125 F. Supp. 2d at 566, J.A. 53. Instead, petitioner "expressly contested any characterizations of these convictions that went beyond the words of the complaints." *Id.*, J.A. 53. Nonetheless, the prosecution urged the District Court to resolve these ambiguities by relying upon the incident reports and complaint applications from the case files to conclude that petitioner in fact broke into buildings and that his prior convictions were therefore for generic burglary. J.A. 21-26, 28-30.

Citing *Taylor* and *United States v. Dueno*, 171 F.3d 3 (1st Cir. 1999), the District Court indicated that it could not lawfully resolve these ambiguities in the manner suggested by the prosecution. J.A. 27-28. However, the District Court did not immediately impose sentence and instead afforded the prosecutor an opportunity to move for an upward departure based upon petitioner's criminal history. J.A. 30. The prosecution accepted the court's invitation and moved for an upward departure pursuant to U.S.S.G. § 4A1.3 (permitting

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more than twenty years or in a jail or house of correction for not more than two and one-half years.

Mass.Gen.Laws ch. 266, § 18 – Dwelling house; entry at night; breaking and entering in day time; weapons; punishment.

Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years. . . .

upward departures whenever the criminal history category understates the seriousness of the defendant's criminal record). *See*, *Shepard I*, 125 F. Supp. 2d at 563, J.A. 47-48.

When the sentencing hearing reconvened on July 14, 1999, the District Court addressed the prosecution's motion for an upward departure. The prosecution asked for departure from offense level 14 to level 24 and a resulting sentence of 120 months. J.A. 33-34. The District Court held that the requested departure did not comply with 18 U.S.C. § 3553(a) which provides: "The Court shall impose a sentence sufficient but not greater than necessary to comply with the purposes set forth in paragraph two (2) of this subsection."[4] The District Court based its upward departure upon its extensive review of petitioner's criminal history and personal characteristics. The court noted that, while petitioner had an extensive criminal history, the circumstances relating to petitioner's difficult upbringing, the nature of his crimes, and his efforts to defeat his drug addictions were compelling reasons not to depart upward the full ten levels requested by the government. *See Shepard I*, 125 F. Supp. 2d at 571-72, J.A. 64-66.

Accordingly, the District Court departed upward two levels, settling on a guideline range 37 to 46 months. *Id.* at 572, J.A. 65-66. The District Court did not impose an ACCA enhanced sentence, concluding that the facts presented in the incident reports and complaint applications – "the location of the breaking and entering – were not necessary to his

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[4] Section 3553(a)(2) provides that the court shall consider:

"(2) The need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . . ."

[petitioner's] state plea." *Id.* at 569-70, J.A. 59-60. Because the facts underlying the guilty pleas were "neither litigated nor conceded" by petitioner, the District Court held that reliance on those alleged facts "violates the policies articulated by the Supreme Court in *Taylor*, and subsequent First Circuit precedent." *Id.* at 570, J.A. 60-61.

The District Court imposed a sentence designed to afford petitioner an opportunity to address his addiction. "While Shepard's record suggests recidivism, it also suggests an out of control drug addict. . . . Whatever sentence I impose must include serious attention to Shepard's addiction." *Id.* at 572, J.A. 65. Because the Probation Department reported that the Bureau of Prisons would require a sentence of at least 46 months in order for petitioner eligible for its "intense drug treatment program," *id.*, J.A. 65, the District Court sentenced petitioner to 46 months in prison, with three years of supervised release to follow. In addition, the court directed that petitioner participate in a 500 hour Comprehensive Drug Treatment Program offered by the Bureau of Prisons.[5] *See id.* at 564, 572; J.A. 49, 66.

2. The prosecution appealed the District Court's decision not to impose the ACCA fifteen-year mandatory minimum enhancement, "arguing that the district court erred by refusing to consider the police reports and complaint applications..." *United States v. Shepard*, 231 F.3d 56, 62 (1st Cir. 2000) ("*Shepard II*"), J.A. 74. Because petitioner's prior convictions were the result of guilty pleas to nongeneric state breaking and entering statutes, the First Circuit determined that it was necessary to examine "case specific documents" in order to resolve uncertainty regarding whether the convictions were for "violent felonies." *Id.* at 65, J.A.80. Although the First Circuit acknowledged the ambiguity of the statutes of

[5] Petitioner complied, completing the BOP's comprehensive drug treatment program and writing to the judge periodically to report on his progress. Resentencing Proceedings Tr. at 2-4 (D. Mass. Dec. 13, 2001).

conviction, it disagreed with the District Court's adherence to *Taylor*'s holding. Instead, the First Circuit declared that *Taylor* failed to "address the extent to which a sentencing court can go beyond the fact of conviction, for the purpose of determining an ACCA enhancement, when a defendant has *pled guilty* to a charge based on a statute that includes both violent and non-violent offenses within the meaning of the ACCA." *Id.* at 63, J.A. 77.

Turning to its own precedent, the First Circuit relied upon *United States v. Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992) and concluded that the sentencing judge should have evaluated the reliability of the incident reports and complaint applications as a basis for determining "whether the defendant and the government both believed that Shepard was entering guilty pleas to the generically violent crime of breaking and entering a building."[6] *Shepard II*, 231 F.3d at 67-68, J.A. 86. The First Circuit also held that such a fact-finding inquiry was not foreclosed by petitioner's "*Taylor*-based categorical objection to the use of the complaint applications and police reports" because his objection did not "challenge the accuracy of the statements in those documents describing entries into buildings." *Id.* at 68, J.A. 87. The First Circuit vacated the sentence and remanded with the instructions that the District Court consider whether there was sufficient evidence, including the police reports and complaint applications, to conclude that the petitioner and the government both believed that it was generic burglary that the petitioner had pleaded

[6] In *Harris*, the First Circuit ruled that:

"...it would be appropriate for the sentencing court to look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested (in this context) in the violent or non-violent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime ("building") rather than the generically [illegible] violent crime ("vehicle") was at issue."

964 F.2d at 1236.

guilty to. *Id.* at 70, J.A. 91. The First Circuit also specified that the preponderance of evidence standard was to be applied and that the prosecutor bore the burden of proof. *Id.* at 68, J.A. 87.[7]

3. On remand, the district court held two hearings. At the first hearing, petitioner filed an affidavit regarding the guilty pleas at issue. He stated, *inter alia*, that the incident reports and complaint applications played no part in any of his guilty pleas; that he had never been asked to admit the truth of the facts alleged therein and had never done so. J.A. 100-04; *see*, *United States v. Shepard*, 181 F. Supp. 2d 14, 19 (D. Mass. 2002) ("*Shepard III*"), J.A. 154. Petitioner's affidavit thus addressed the critical question on remand, which was whether the police reports and complaint applications had played any role in his prior plea proceedings and, on that basis whether he believed at the time that he was entering pleas to generic burglary offenses. *Shepard II*, 231 F.3d at 69, J.A. 88-89. The District Court afforded the prosecution additional time to respond to petitioner's affidavit and scheduled a second hearing.[8]

At the second hearing, the parties agreed that the central question on remand was: "What did Mr. Shepard plead to on those prior occasions?" *Shepard III*, 181 F. Supp. 2d at 17, J.A. 155. In response to petitioner's affidavit, the prosecution offered no evidence as to what occurred during petitioner's plea hearings and relied solely upon the certified copies of the

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[7] Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied over the dissent (without opinion) of Judges Selya and Lynch. This Court denied an interlocutory petition for a writ of certiorari after calling for a response to the petition. *Shepard v. United States*, 534 U.S. 829 (2001) (No. 00-8998).

[8] Citing *Commonwealth v. Quinones*, 608 N.E.2d 724 (Mass. 1993), the District Court observed that reconstruction of a guilty plea record, based on the state court's standard practice, is permissible and often persuasive evidence under Massachusetts practice. *Shepard III*, 181 F. Supp. 2d at 20 n.11, J.A. 155.

police reports and complaint applications. *Id.* at 23, J.A.160. The District Court held that the incident reports were not probative of the nature of petitioner's pleas unless they "had some tangible relationship to the plea colloquy." *Id.* at 22, J.A. 159. The prosecution conceded that it lacked any such evidence.

Accordingly, the District Court concluded that the incident reports and complaint applications themselves were not sufficient evidence that petitioner had adopted the facts alleged in the reports. Petitioner's affidavit was the sole evidence of what had actually transpired at the plea proceedings. The District Court therefore could not conclude that the elements of generic burglary had been adjudicated. *Id.* at 25-26, J.A.165. The court reimposed its prior sentence on remand, including the upward departure based upon petitioner's criminal history. *Id.* at 18, J.A. 150. The government appealed.

4. The First Circuit concluded that the District Court's decision not to apply the sentence enhancement was "clearly erroneous" and again remanded the case, this time with explicit instructions to re-sentence petitioner to the mandatory minimum fifteen year sentence prescribed by the ACCA. *United States v. Shepard*, 348 F.3d 308, 314-15 (1st Cir. 2003) ("*Shepard IV*"); J.A. 183.

The First Circuit dismissed the district court's reliance upon petitioner's affidavit stating that he had never admitted to the facts alleged in the police reports and its conclusion that "the police reports did not provide reliable evidence on the central question, 'what did the defendant plead to in the state court?'" *Id.* at 311, J.A. 176. Instead, the First Circuit, adopted a rationale based upon a Massachusetts Superior Court standing order, cite, despite the fact that the relevance and operation of that standing order had not been briefed by either party or discussed at oral argument. The First Circuit observed that the standing order provides that criminal defendants are to be given copies of the police reports and complaint applications

at arraignment. Thus, according to the First Circuit, there is a presumption that defendants are aware of the factual allegations contained therein. The court further held that unless the allegations contained in these reports are challenged by a defendant, there is a "compelling inference" that an otherwise guilty plea to a nongeneric statute constitutes an admission to the fact alleged in the police reports. Because petitioner's affidavit did not challenge the accuracy of the facts alleged in the police report, the First Circuit concluded that the reports were "unimpeached" and thus "carried the day." *Id.* at 314, J.A. 183.

SUMMARY OF ARGUMENT

In *Taylor v. United States*, 495 U.S. 575 (1990), the Court addressed the application of the ACCA to prior convictions obtained under non-generic burglary statutes which may or may not qualify as "violent felonies" under the ACCA. The Court unambiguously held that the ACCA does not permit sentencing courts to engage in a factual inquiry into the underlying convictions, but rather must apply a "categorical" approach looking only to the fact of conviction and the elements of the statute of conviction. If the elements adjudicated were those of generic burglary, the conviction qualifies as a "violent felony" under the ACCA. If it cannot be determined from the statute of conviction that these elements were necessarily adjudicated, the conviction does not qualify. The First Circuit, in this case, has ignored the Court's straightforward holding in *Taylor* and has instead required an impermissible factual inquiry into the conduct underlying the petitioner's prior guilty pleas to nongeneric burglary statutes to conclude that his conduct *actually* amounted to generic burglary. This factual inquiry is inconsistent with *Taylor*. For this reason the First Circuit's ruling cannot stand.

In addition to its erroneous interpretation of *Taylor*, the approach adopted by the First Circuit raises grave and

doubtful constitutional questions under the Fifth and Sixth Amendments. The First Circuit's approach involves judicial fact finding, under a preponderance of evidence standard, that leads to ACCA-based, mandatory minimum sentences that are significantly above the statutory maximum under 18 U.S.C. § 922(g)(1). The fact-finding mandated by the First Circuit goes far beyond inquiry into the mere fact of prior conviction and expressly requires an examination of record evidence and plea proceedings in order to make a *sui generis* assessment, long after the fact, of whether the prior convictions were "violent" versions of the felonies defendant had pled guilty to. This sort of judicial fact-finding violates a defendants Sixth Amendment right to a jury trial. The court's approach also violates the Due Process Clause of the Fifth Amendment because it permits a sentencing court to find these facts by a preponderance of the evidence and impermissibly shifts the burden to the defendant to prove that the ACCA enhancements do not apply.

The First Circuit has interpreted the Massachusetts breaking and entering statutes and petitioner's guilty pleas thereto as "generic" burglaries. In doing so, the Court of Appeals has incorrectly characterized those statutes and guilty pleas as ambiguous as to whether they constitute generic burglary. The Court's resolution of the purported ambiguity interprets petitioners' guilty pleas as pleas to a violent felony rather than a nonviolent felony. The First Circuit's own construct thereby violates the rule of lenity and for this additional reason must be reversed.

ARGUMENT

I. *TAYLOR* APPLIES TO THIS CASE AND THE CATEGORICAL APPROACH MANDATED IN THAT OPINION REQUIRES REVERSAL.

The First Circuit's opinions in this case reflect significant and untenable departures from this Court's ruling in *Taylor*, a

ruling that squarely applies here. As in *Taylor*, this case requires construction of § 924(e), which specifies the predicate offenses for ACCA enhancement, including "burglary." 495 U.S. at 590-96. As in *Taylor*, the prior convictions at issue here stem from state breaking and entering statutes that specify elements broader than generic burglary because those statues include enclosures other than buildings, such as vehicles and vending machines. *Id.* at 602; J.A. 52. As in *Taylor*, it is not possible to discern, from these broader state statutes, whether petitioner's guilty plea was to a generic burglary, or to a form of breaking and entering that did not involve a building. *Id.* at 602; J.A. 52.

On the basis of its plain reading of § 924(e) and the constitutional implications of a more expansive reading, *Taylor* calls for constitutionally required restraint on the part of sentencing courts in applying the ACCA in circumstances where the underlying convictions are based on non-generic "burglary" statutes. At bottom, *Taylor* precludes sentencing courts from making *sui generis* factual assessments of the defendant's underlying conduct in order to draw inferences about the qualifying status of those convictions for three important reasons. First, the facts upon which the First Circuit relies in characterizing petitioner's prior convictions as "violent felonies" were neither adjudicated nor necessary to the prior guilty pleas. Second, such exercises by sentencing courts run afoul the doctrine of constitutional avoidance. Third, such exercises risk "mini-retrials" of earlier convictions that are a waste of judicial resources, unfair to defendants and unlikely to produce consistent applications of the ACCA.

The uniform, categorical approach set forth in *Taylor* is required by the plain text of § 924(c)(2)(B). That statute defines "violent felony" and specifies that a "violent felony . . . is "burglary." *Id.* at 599. The absence of any qualification of this language led the Court to conclude that Congress intended uniform, federal definition of burglary that

does not turn on the vagaries of state definitions or labels (as in Massachusetts, for example, where the label is "breaking and entering"). *Id.* at 596-97. Drawing from the legislative history and a review of state criminal codes, the Court established a "generic, contemporary meaning of burglary that contains at least the following elements: (1) an unlawful or unprivileged entry into or remaining in, (2) a building or other structure, (3) with intent to commit a crime." *Id.* at 598 (citations omitted). These are the three elements of generic burglary which establish the benchmark for categorical analysis of prior convictions.

Taylor required that courts applying the ACCA look to this definition and only this definition in determining whether a prior conviction was for a generic burglary. *Id.* at 599. Accordingly, the court's prescribed method is a "categorical approach." The preferred method of making this categorical determination is to compare the elements of the statute of conviction to these generic elements on an "in" or "out" basis. But where the statutory elements are not generic, the conviction may still qualify where all the elements of generic burglary have been adjudicated. *Taylor* specifies that a in most cases sentencing court may look only to the statutory definition of the prior offense to make it categorical. *Id.* at 602.

Taylor therefore is definitive in holding that a prior conviction under a non-generic burglary statute qualifies as a violent felony only where the statute of conviction is unambiguously generic, or the sentencing court determines "that the jury necessarily had to find an entry of a building to convict." *Id.* at 602. *Taylor* plainly sets forth a standard that requires the sentencing court to conclude that the state court necessarily adjudicated all the *elements* of a generic burglary.

When elements of the statute of conviction "substantially correspond" to the elements of generic burglary, the sentencing court can infer that the defendant was "necessarily" found guilty of all the elements of generic

burglary. *Id.* at 600. Where the statute of conviction is non-generic, however, that inference obviously cannot be drawn. But if a jury has convicted the defendant, the inference that the defendant was necessarily found guilty of all of the elements of generic burglary can be drawn if it is supported by *both* a generic charging document and jury instructions which require the jury to find only generic burglary. *Id.* at 602.[9]

Adjudication of the required elements for earlier, qualifying convictions cannot be the province of a sentencing court under *Taylor*. Instead, the role of the sentencing court is only to determine whether that adjudication took place and whether the defendant was convicted of those elements, whether by plea or by jury determination. The inquiry continues to be solely a question of law. *United States v. Vidaure*, 861 F.2d 1337, 1340 (5th Cir. 1988), *cited with approval in Taylor*, 495 U.S. at 601.

A. The First Circuit Misreads *Taylor*.

The First Circuit's reasoning flows entirely from an erroneous premise; namely, that *Taylor* provides a blanket exception to its categorical requirements in cases involving guilty pleas obtained under non-generic statutes. In guilty plea cases, the First Circuit requires a sentencing court to find facts, on a preponderance of the evidence standard, to determine whether the defendant actually committed generic burglary. Pursuant to such findings, defendants would be exposed, as in this case, to significantly enhanced sentences far beyond the maximum penalty for the present charge.

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[9] In *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1998), *cited approvingly in Taylor*, 495 U.S. at 600, the Ninth Circuit considered and rejected an "intermediate" approach under which the sentencing court would consider only court records because that method suffered from most of the shortcomings of the fact finding method. *Sherbondy*, 865 F.2d at 1008 n.16

The First Circuit thus mistook *Taylor*'s holding and called for sentencing courts to determine not whether the qualifying elements were in fact adjudicated, but whether there are facts somewhere present in the record that would permit the sentencing court to reconfigure the prior non-generic conviction into generic burglary based on the defendant's conduct. It did not matter to the First Circuit that this court explicitly rejected fact-finding in *Taylor* for good and sufficient reasons clearly explained. It did not matter to the First Circuit that those facts were not themselves adjudicated in the state court. It did not matter to the First Circuit that sentencing courts would use such unadjudicated facts, long after the proceedings, retry the defendant on a charge never made against him in state court. And it did not matter to the First Circuit that none of constitutional procedural protections guaranteed to defendants, such as the right to have such findings made by a jury beyond a reasonable doubt, were attached to these after-the-fact determinations of such great consequence. Instead, it mattered only the documents used as a basis for such fact-finding were not patently unreliable.[10] The First Circuit's objective apparently was to insure that the ACCA be applied as broadly as possible to non-generic convictions. *Shepard IV*, 348 F.3d at 311-12, 314, J.A. 176-77, 181. Plainly, the exercise required by the First Circuit amounts to an adjudication of facts anew, not a determination of whether those facts were adjudicated below. Taylor permits only the latter and expressly disapproves of the former.

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[10] The First Circuit's final opinion in this case, for example, holds that it was clearly erroneous for the District Court not to find the police reports (and the subsequent applications for complaint which relied wholly upon on the police reports) sufficiently reliable to find that Mr. Shepard had pleaded guilty to generic burglaries. *Shepard IV*, 348 F.3d at 314, J.A. 182.

B. The First Circuit Has Adopted a Factual Inquiry Prohibited By *Taylor*.

Notwithstanding this Court's mandate that sentencing courts not engage in a factual inquiry with respect to determining which prior convictions qualify under the ACCA, the First Circuit requires just that. Indeed, the court embraces this inquiry, stating that "courts routinely resolve factual disputes during sentencing hearings [and] [w]e see no reason why disputes about the meaning of a defendant's guilty plea should be immune from that process, so long as the inquiry is consistent with the principles of Taylor." *Shepard II*, 231 F.3d at 69, J.A. 89-90. As justification for this subjective test, the First Circuit draws a distinction between a factual inquiry into the underlying conduct and a factual inquiry into what the defendant and the government believed at the time of the plea hearing. *See id.* at 69-70, J.A. 81. The latter, according to the court of appeals avoids the factual inquiry prohibited by *Taylor*. The First Circuit's distinction is without merit because, at bottom, the court's inquiry is focused on the defendant's conduct that resulted in the guilty plea and not on the elements that were necessarily adjudicated.

Taylor did not disapprove of fact finding for some purposes and allow it for others. The Court specifically rejected enhancement "on the ground that he actually committed a generic crime." *Taylor*, 495 U.S. at 600-02 ("looking only to the fact of the conviction and not to the particular facts underlying those convictions."). In the face of this prohibition, the First Circuit asked: "But how can one tell whether generic burglary was the crime of conviction if one does not look at what actually happened at the scene of the crime?" *Shepard IV*, 348 F.3d at 312, J.A. 178. The First Circuit simply circumvented *Taylor* with an argument that runs: if the defendant actually committed generic burglary,

then he was probably charged with generic burglary.[11] If he was charged with generic burglary, he probably admitted generic burglary in his guilty plea; therefore, his guilty plea was really a generic burglary conviction. It is plain that this is an enhancement bottomed on a finding of fact that the defendant actually committed generic burglary.[12]

This device creates a severe due process problem. Judges have found facts from a police report to determine that petitioner is guilty of generic burglaries he was never charged with, on the ground that, although he was convicted of a different crime, generic burglary is actually what was on his and the prosecutor's minds when he pled guilty. But a fundamental element of due process is actual notice of the true nature of the charge. *Smith v. O'Grady*, 312 U.S. 329, 334 (1941); *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) What the First Circuit has constructed is a truly unwitting guilty plea.

The First Circuit inquiry says nothing about the elements of conviction and so does not contribute anything to a categorical analysis. The *Shepard IV* inquiry converts the sentencing judge's task from that of ascertaining what elements were adjudicated in the prior proceeding to adjudicating those elements herself, *de novo*, years after the fact, on dubious evidence, employing a preponderance of the evidence standard. *Cf. Blakely*, 124 S. Ct. at 2536-37. The

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[11] The First Circuit papers over the fact that petitioner was not formally charged generically by positing a "compelling inference" that the non-generic complaint "embodied" the facts in the police report and that the plea was to the "embodied" complaint. *Shepard IV*, 348 F.3d at 314, J.A. 182.

[12] "There is surely an air of make-believe about this case. No one, and this includes Shepard and the district court, has seriously disputed that Shepard in fact broke into half a dozen or more buildings . . . . [H]e is just the kind of burglar whom Congress had in mind adopting the tough fifteen year minimum sentence for armed career criminals." *Shepard IV*, 348 F.3d at 311, J.A. 176.

district court recognized that this post hoc fact-finding was inimical to *Taylor*'s categorical analysis and refused to engage in it. *Shepard I*, 125 F. Supp. 2d at 569-70, J.A. 59-62; *Shepard III*, 181 F. Supp. 2d at 24, J.A. 162-63.

C. The First Circuit Shifts The Burden To The Defendant To Show That The Enhancement Does Not Apply.

While the court acknowledges that it is the government's burden to prove that a prior conviction qualifies under the ACCA, it places the burden on the defendant by starting with the presumption that a defendant is aware of the allegations made against him and that a plea of guilty is an admission of each fact alleged. It then requires that a defendant demonstrate that there was no mutual understanding between himself and the government that he was admitting to the elements of generic burglary at the time the plea was entered. The First Circuit found Shepard guilty of generic burglary based solely on the unlitigated allegations in old police reports.

The First Circuit's finding that a Massachusetts district court complaint "embodies" the facts in a police report submitted with a complaint application apparently rests on the court's understanding of the complaint and discovery procedures followed in the state district courts. This understanding was not derived from evidence in the record but from general information developed by the court independently of the litigation process. *Cf. United States v. DiPina,* 178 F.3d 68, 73-78 (1st Cir. 1999); *United States v. Roberts,* 39 F.3d 10, 13 (1st Cir. 1994) (Each holding that findings of the process followed in state court and its effect are issues of fact to be determined on the basis of record facts).

Finally, the First Circuit's "compelling inference" that petitioner pleaded guilty to the facts "embodied" but not expressed in the non-generic complaints finds no footing in

the law. The Massachusetts courts have been disinclined to discover a factual basis for guilty pleas for which there is no record colloquy. *Commonwealth v. Duquette*, 438 N.E.2d 334, 339 (Mass. 1982). In fact, even if the "embodiment" fiction was fact, a guilty plea constitutes an admission only t the elements set out in the charging document, and does no constitute an implicit admission to extraneous facts recited there. *United States v. Thomas*, 355 F.3d 1191, 1996 (9th Cir. 2004); *see also, United States v. Broce*, 488 U.S. 563, 569 (1989) (a defendant who pleads guilty admits "all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence").

The unavoidable fact remains that the burglary of a building issue which is indispensable to the ACCA enhancement issue was evidently irrelevant in the state court. Petitioner could have been charged with generic burglary but was not. The state court record indicates indifference to the "building" element in state court, a fact which the federal prosecutor recognized in asking the District Court: "I mean, what if the lower court's determination was how do you plead to 266, 16, and there is no further determination because the state court's not looking at the same things we're looking at?" To the District Court, this was a serious concern. J.A. 29. In the end, the prosecutor failed to produce any evidence of actual admissions in the plea colloquy. J.A. 133 ("I have no indication of what the plea colloquy determined or what documents were cited at the plea colloquy.").

The First Circuit's imagined meeting of the minds in petitioner's state plea proceedings is contradicted by actual experience in the federal courts. Justice Scalia pointed out in his dissent in *United States v. Bousley*, 523 U.S. 614 (1998) (dissenting) that the factual implications of guilty plea admissions will depend upon the legal issues being addressed. A defendant's plea to "knowingly and intentionally us[ing] . . . firearms during and in relation to drug trafficking" meant mere possession of a firearm in the vicinity of the drug

offense before this Court's ruling in *Bailey v. United States*, 516 U.S. 137, 144 (1995), but connoted active employment of the firearm after that decision." A guilty plea to the former does not imply an admission of the latter: "the factual basis [of a plea] will not include a fact which, by hypothesis, the court and the parties think irrelevant." *Bousley*, 523 U.S. at 631 n.* (Scalia, J., dissenting).

The heart of the First Circuit's ruling is that petitioner should be sentenced as an armed career criminal because he actually committed at least three generic burglaries. Here, as the prosecutor conceded, the issue of whether petitioner had burglarized a building as opposed to some other enclosure was not "necessarily adjudicated" in his prior plea proceedings. *Taylor*, 495 U.S. at 602. Yet the First Circuit ignored the implications of this concession for the prosecutions ability to meet its burden and instead looked to petitioner to rebut the "compelling inference" that the incident reports were reliable evidence of admissions to generic burglary. Looking past the First Circuit's debunked "compelling inference" construct, it is clear that the heart of its holding is that petitioner should be sentenced as an armed career criminal because the federal court believes that he actually committed at least three generic burglaries. This is exactly the rationale rejected in *Taylor*. The First Circuit's transparent circumvention of *Taylor*'s holding should be rebuffed.

D. The First Circuit's Rule Creates The Problems That *Taylor* Seeks To Avoid.

Taylor clearly identified the problems it sought to avoid in rejecting a fact finding method of qualifying prior convictions as ACCA predicates. Allowing the government to "seek enhancement on the ground that [the defendant] actually committed generic burglary" would have required the Court to devise an efficient, fair and uniform method of making that determination. 495 U.S. at 600. The Court concluded that, where a jury trial produced the conviction, reference to the

charging document and jury instructions would provide the information needed to identify the elements of conviction and carry out the categorical analysis. But it made no parallel provision for guilty pleas because it rejected fact finding, and the records of guilty plea convictions do not reliably identify the elements of conviction. Standards for determining what evidence could be considered would have to be established. A fact finding method would suffer from the myriad problems associated with old, stale evidence. *Sherbondy*, 865 F.2d at 1008 & n.16. Questions concerning the scope of permissible defenses would have to be resolved. In guilty plea cases, the problem of abbreviated and incomplete factual records would present persistent problems. And the question of whether the defendant was entitled to a jury trial to determine whether he had actually committed generic burglary would have to be addressed. *Taylor*, 495 U.S. at 601.

Harris and its progeny, culminating in *Shepard IV*, provide conclusive proof that the Court's assessment of the shortcomings of the fact finding method was prophetic. After twelve years of incessant litigation, including six years of litigation in this case, all of these problems have presented themselves and none has been acceptably resolved.

For example, the First Circuit has held subsequent to its rulings in *Shepard* that it is fair and consistent with *Taylor* to rely on the untested hearsay statements in an old police report of initial investigation to find that a defendant committed a crime he was never charged with. In *United States v. Delgado*, 288 F.3d 49 (1st Cir. 2002) the court approved, as being within the district court's fact finding discretion, an ACCA enhancement finding that the defendant was guilty of generic burglary on the basis of a police report where the defendant had been charged with armed house invasion even though he pleaded guilty only to an unspecified and lesser

offense.[13] *Id.* at 53-54 & n.6. The Circuit's interpretations of *Taylor* have been so confusing as to prompt it to refer to "the murky world of *Taylor v. United States*." *Emile v. INS*, 244 F.3d 183, 185 (1st Cir. 2001).

The standard of admissible evidence appears to be anything in the state court file which purports to describe the defendant's underlying conduct, unless the defendant challenges it factually. That standard unfairly burdens defendants and utterly fails to even acknowledge the constitutional concerns that the *Taylor* court recognized as inherent in such fact-finding forays.

Shepard II directed the district court to try to reconstruct the plea proceedings to determine whether petitioner admitted generic burglary then and there. But *Shepard IV* rejudicated that approach and substituted a procedural construct which, when defendants respond with claims of a right to trial, will squarely present the question of whether the Sixth

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[13] Reluctantly concurring, Judge Selya said:

> In virtually all circumstances, newly-constituted panels within a circuit are bound by the holdings of prior panels (citations omitted). Given the force of this rule and its applicability here, I acknowledge that *United States v. Shepard*, 231 F.3d 56, 66 (1st Cir. 2000), dictates the outcome of this appeal. I write separately, however, because I believe that Shepard, and cases like it, take impermissible liberties with the narrow exception envisioned in *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143 (1990), 109 L. Ed. 2d 607, and, thus, undermine the integrity of the categorical approach favored by the Supreme Court for cases in which predicate offenses are used to enhance defendant's sentences. Were we writing on a pristine page, I would hold particularized inquiry of the type and kind approved in the majority opinion inquiry (which ranges well past the charging papers, jury instructions, and other formal accouterments of the predicate offense to a copy of a police report compiled by an investigating officer) to be beyond the limits contemplated by the *Taylor* Court. The page, however, is not pristine, and so I reluctantly concur in the judgment of the panel.

Delgado, 288 F.3d at 57.

Amendment requires a jury trial and the beyond a reasonable doubt standard of proof.

II. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE REQUIRES THAT THE ACCA BE INTERPRETED TO PROHIBIT JUDICIAL FACT FINDING.

"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones*, 526 U.S. at 239 (citations omitted). This Court's opinion in *Taylor* rests in part on this very doctrine of constitutional avoidance. Although the *Taylor* Court did not identify the doctrine by name, the Court articulated among the reasons for its holding the implications for a defendant's right to a jury trial if § 924(e)(2)(B)(ii) was interpreted to permit a "factual approach." 495 U.S. at 601. Thus, the Court held that the only plausible interpretation of § 924(e)(2)(B) is that it requires the sentencing court "to look only to the fact of conviction and to the statutory definition of the prior offense." *Id.* at 602. In applying the doctrine of constitutional avoidance to interpret the ACCA as prohibiting findings of fact that operate to enhance a sentence significantly, the *Taylor* Court presaged the Court's later opinions in *Jones*, 526 U.S. at 239, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

In *Jones*, for example, the Court construed a federal criminal statute to avoid Fifth and Sixth Amendment constitutional issues stemming from judge-made findings of fact that enhanced penalties beyond the statutory maximum. While both *Jones* and *Apprendi* note that "the fact of prior conviction" is excepted from prohibited factual findings, the justification for that exception is inapplicable here. The fact of a prior conviction is exempted from Fifth and Sixth Amendment procedural safeguards because they were in place during the course of those convictions. Here, however,

the factual inquiry goes beyond the fact of conviction to establish the underlying conduct and the events occurring at plea proceedings. Under the First Circuit's test, prior convictions may be reconfigured as a violent crime and therefore ACCA-qualifying felonies solely on the basis of the sentencing court's factual inquiry into what the defendant did and therefore "really" pled to. As noted in *Taylor*, such inquiry raises grave and doubtful constitutional questions, questions that have now been resolved by *Jones*, *Apprendi*, and *Blakely* in a way that supports petitioner's construction of *Taylor*.

A. Constitutional Avoidance in the Sentencing Context.

The precise constitutional problem to be avoided here is strikingly similar to the problem which influenced the Court's interpretation of the "carjacking statute" (18 U.S.C. § 2119) in *Jones v. United States*, 526 U.S. 227 (1999). That statute was interpreted as defining three different crimes rather than a single crime with two aggravating factors to be determined by the sentencing judge on a preponderance of the evidence. *Id.* at 251-52. There is no question here that § 924(e) elevates the penalty parameters as severely or even more severely than those at issue in *Jones*. Like Jones, the issue here is whether the sentencing court may consider facts not adjudicated in the prior proceeding in order to impose sentence for the "aggravated" version of the crime. The constitutional principle discerned in *Jones* was "under . . . the jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6. In 1999, this principle had only been suggested by prior cases, but is now clearly established. *Apprendi*, 530 U.S. at 490; *Ring v. Arizona*, 536 U.S. 584, 603-09 (2002); *Blakely*, 124 S. Ct. at 2537. Thus the Court's level of constitutional concern here should rise above the level of doubt to near certainty.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000) the Court held that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

In both *Apprendi* and *Ring*, this Court concluded that the defendant's Sixth Amendment rights had been violated because the sentencing judge had "imposed a sentence greater that the maximum he could have imposed under state law without the challenged factual finding." *Blakely*, 124 S. Ct. at 2537. Similarly, in *Blakely*, the defendant's sentence was increased beyond the statutory maximum on the basis of findings of fact (that he had acted with "deliberate cruelty") by the sentencing judge that "were neither admitted by petitioner (in his guilty plea) nor found by a jury." *Id.* The Court held that *Blakely's* right to jury trial was violated because the judge acquired the authority to impose an enhanced sentence "only upon finding some additional fact." *Id.* at 2538.

As *Apprendi* specifies, the fact of a prior conviction is an exception to this rule. This is because the certainty that the defendant received due process in the proceedings leading to the conviction ameliorates the concern that taking judicial notice of the fact of conviction violates a defendant's right to due process in a recidivist sentencing forum. 530 U.S. at 487-88. "The rationale for exempting the fact of prior conviction from jury trial guarantees is that, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249.

However, the confidence that the *Jones* Court had in the integrity of prior convictions is misplaced in situations where, as here, a subsequent court must engage in fact-finding to resolve an ambiguity about the nature of the prior

conviction.[14] Here, the application of § 924(e) turns on a post hoc adjudication which was not conducted in accordance with these guarantees. Burglary of a building was not charged in the complaints to satisfy fair notice requirements. JA 52; J.A.III. 5, 8, 15, 21. It was not established beyond a reasonable doubt nor admitted in the guilty pleas, either as a fact or as an element. J.A. 24, 26, 28-30.

A plain reading of the opinion in *Taylor* interdicts these constitutional concerns. Limiting *Taylor*'s reach to the fact of conviction as determined by categorical approach cabins § 924(e) within the confines of the *Apprendi-Blakely* exception. *United States v. Cooper*, 2004 U.S. App. LEXIS 14685, at **29 n.3 (10th Cir. 2004); *United States v. Sanders*, 2004 U.S. App. LEXIS 15368, at *5 n.3 (8th Cir. 2004). *Taylor*'s categorical approach addresses and answers only questions of law (*e.g.*, whether the elements of the prior conviction encompass the elements of generic burglary) and so does not infringe on the right to have the jury assess all the facts which alter the congressionally proscribed range of penalties to which a criminal defendant is exposed. *Jones*, 526 U.S. at 253 (Scalia, J., concurring).

B. The First Circuit's Interpretation of the ACCA Raises Grave and Doubtful Constitutional Questions.

The approach adopted by the First Circuit permits and, as in this case would *require* the sentencing court to find facts beyond those adjudicated in the prior guilty plea in order to determine whether that plea was for generic burglary. These facts are not limited to the fact of conviction. The opinion in *Shepard IV* requires the sentencing court to receive and evaluate extrinsic evidence to assess the defendant's

[14] As noted in Justice Thomas' separate concurrence in *Apprendi*, even fact-finding limited to prior conviction may itself raise the same grave and doubtful constitutional questions as fact-finding in relation to other enhancements. *Apprendi*, 530 U.S. at 519-21.

underlying criminal conduct. 348 F.3d at 314; J.A. 181-82. If that evidence indicates, for example, that the facts indicate that a defendant may actually have committed a generic burglary then the defendant must adduce persuasive evidence to the contrary. In the absence of such evidence and "[i]n the absence of other evidence of peculiar circumstances," *id.*, the court must infer that he pleaded guilty to generic burglary. *Shepard IV*, 348 F.3d at 314, J.A. 182. The guilty plea to a violation of 18 U.S.C. § 922(g)(1) authorizes a maximum of ten years imprisonment; a finding that the defendant qualifies as an armed career criminal requires a minimum sentence of fifteen years; there is no statutory maximum except that prescribed by the Sentencing Guidelines.

Avoiding this kind of "mini-trial" was one of the reasons for *Taylor*'s explicit rejection of a fact finding approach and the Court's embrace of a categorical approach that turns on legal questions alone. Indeed, the *Taylor* Court approved the Fifth Circuit's holding in *Vidaure*, 861 F.2d at 1340, that the ACCA determination of whether a crime was a "violent felony" involved only an issue of law because it did not involve judicial assessment of extrinsic evidence. *Id.* The Court's later decision in *United States v. Gaudin*, 515 U.S. 506 (1995) reinforces the need to maintain this boundary. In *Gaudin*, the Court reiterated that deciding issues of fact as well as mixed issues of law and fact is a function constitutionally allocated to the jury. *Id.* at 513-15. *Taylor*'s categorical approach is therefore entirely divorced from questions that properly fall within the province of the jury.

Petitioner did not contest the fact of his prior convictions. Following First Circuit precedent, the District Court received extrinsic evidence (the police reports and complaint applications) and made findings of fact attempting to reconstruct the state court guilty plea proceedings.[15] *Shepard*

[15] Under the First Circuit's own test, the District Court's finding that the incident reports and other evidence were not a part of the plea

III, 181 F. Supp. 2d at 23-24, J.A. 158-62. However, considering extrinsic evidence, the First Circuit made extensive findings of fact of its own regarding the underlying conduct and the plea proceedings, as well as findings concerning Massachusetts state court procedures. It relied heavily upon its own assessment that petitioner had both actually committed generic burglary and admitted the facts of generic burglary in his guilty pleas to conclude that petitioner had been convicted of at least three prior generic burglaries. *Shepard IV*, 348 F.3d at 311, 313-14, J.A. 182. Indisputably, the court went far beyond the fact of conviction in obedience to its interpretation of *Taylor* and the ACCA.

Grave and doubtful questions arise not just from the fact-finding objectives of the First Circuit's inquiry, but also from the First Circuit's application of a preponderance standard. In both *Shepard II* and *IV*, the First Circuit approached its own test in a manner befitting civil, rather than criminal proceedings. For example, in *Shepard II*, the Court posited that it would be petitioner's obligation to raise "plausible objections" to the incident reports and if the prosecution did not make sufficient response, "the [sentencing] court may decide that it cannot conclude by a preponderance of the evidence that [petitioner's] pleas of guilty constituted admissions to unlawful entries into buildings." *Shepard II*, 231 F.3d at 69, J.A. 89. In *Shepard IV*, the First Circuit faulted petitioner for failing "to explain any circumstance surrounding the pleas that might defeat the natural inference that the pleas were to the crimes specified in the case files." *Shepard IV*, 348 F.3d at 314, J.A. 181-82.

The First Circuit's resort to the preponderance standard, and, further, to burden-shifting devices under that standard

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proceedings cannot have been erroneous, much less clearly so. The prosecution presented no evidence to connect those documents to the plea proceedings. The First Circuit was only able to make that connection itself through an inappropriated and erroneous presumption regarding Massachusetts state court procedure.

regarding Massachusetts state court procedure, are squarely in conflict with *Jones*, *Apprendi* and *Blakely*. In each of those cases, the Court has not only prohibited judicial fact-finding in usurpation of the jury's role, but has also upheld the defendant's due process right to a determination that beyond sentence enhancing facts existed beyond a reasonable doubt. Under a beyond the reasonable doubt standard, petitioner bears no burden and the prosecution bears a heavy one. The First Circuit's repeated criticism of petitioner for failing to present persuasive evidence that his pleas were not to generic crimes (*see Shepard IV*, 348 F.3d at 314, J.A. 181-82) is the antithesis of a proper due process analysis.

To avoid the "grave and doubtful" Fifth and Sixth Amendment issues squarely presented by the First Circuit's tests, this Court must reaffirm its holding in *Taylor*. *Taylor*'s categorical approach allows the sentencing court to do no more than compare the statutory elements of conviction or the adjudicated elements of conviction to the elements of generic burglary and conclude whether or not they "substantially correspond." It permits no fact finding nor consideration of extraneous evidence. With these restrictions, *Taylor*'s categorical approach involves only question of laws and avoids the grave and doubtful constitutional questions that the Court also avoided in *Jones* and the cases that followed it.

III. THE RULE OF LENITY REQUIRES THAT *TAYLOR*'S MODIFICATION FOR NONGENERIC STATUTES OF CONVICTION BE LIMITED TO JURY TRIAL CONVICTIONS.

Ambiguity concerning the scope of criminal statutes should be resolved in favor of lenity. *See United States v. Bass*, 404 U.S. 336, 347 (1971). Moreover, it is equally well settled that this rule applies not only to "the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Albernaz v. United States*, 450 U.S. 333, 343 (1981). Petitioner's position is that there is no ambiguity with respect to the scope and nature of the Massachusetts state statutes that underlie his

prior convictions: those statutes are non-generic. Consequently, there is no uncertainty regarding the nature of his plea of guilty to violations of those statutes: he did not plead guilty to violent felonies as defined under the ACCA and construed by *Taylor*. The First Circuit, however, in *Shepard II* and *IV* and their antecedents, devised a method to determine whether convictions under statutes that included more than just generic elements were nonetheless convictions for generic burglaries and thus, violent crimes pursuant to the ACCA.

The First Circuit's rulings run afoul of the rule of lenity from the outset. Justice Scalia's separate concurrence in *Taylor* noted that a review of legislative history to determine whether that history displays a more extensive punitive intent than indicated by the statute would only be undone by application of the rule of lenity. 495 U.S. at 603 (Scalia, J. concurring). Similarly, the First Circuit's command that sentencing courts review the record in order to determine whether a prior plea to a non-generic statute in fact could be interpreted as a violent felony was an unnecessary and inappropriate exercise. If the Massachusetts breaking and entering statutes and the resultant pleas thereto are somehow ambiguous as to whether they constitute generic crimes. Then the rule of lenity nonetheless require that they be interpreted as non-generic crimes and no further inquiry would be required.

Instead, the First Circuit's misreading of *Taylor* dramatically expands the scope of application of the ACCA enhancements. *Shepard IV*, 348 F.3d at 311, J.A. 177 (noting that *Taylor*'s categorical method "narrowed the Act dramatically"). As the First Circuit demonstrated in its rulings here, a step past the statute of conviction in assessing the nature of a prior plea is a step onto a slippery-slope of extensive fact-finding. Police reports, applications for complaints, plea proceedings, colloquies and even the intricacies of state court procedures all become fair game

examination and inference by the sentencing court. The First Circuit's exercise of stringing inference upon inference against the backdrop of a silent record is an anathema to the rule of lenity. Nor is the exercise even necessary in order to hold a defendant properly accountable for his criminal history. *Taylor*, 495 U.S. at 601 n.9, 602 n.10 (suggesting that, while the categorical method will not necessarily reach all generic burglary convictions, other sentencing enhancement provisions allow consideration of the defendant's conduct). *Taylor*'s categorical approach, by contrast, also is more likely to promote consistent, uniform application of the ACCA and eliminate reliance on subjective factors in making ACCA determinations. *Sherbondy*, 865 F.2d at 1009 n.17. In this case, the First Circuit has forced a claim of ambiguity. But to the extent that the underlying statutes are purportedly ambiguous with respect to the nature of the crimes they describe and therefore the resulting guilty pleas might be said to be ambiguous as well, the rule of lenity should be applied, and the Court should find that such convictions do not qualify as predicates for ACCA enhancement.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the First Circuit should be reversed, and the judgment of the United States District Court for the District of Massachusetts should be affirmed.

Respectfully submitted,

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No. 03-9168

In the Supreme Court of the United States

REGINALD SHEPARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, when a state offense embraces conduct that constitutes generic burglary under *Taylor* v. *United States*, 495 U.S. 575 (1990), as well as conduct that does not, certified copies of complaint applications and incorporated police reports that are contained in state court files may be used to determine that the defendant's guilty pleas were to generic "burglar[ies]" and thus "violent felon[ies]" within the meaning of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

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In the Supreme Court of the United States

No. 03-9168

REGINALD SHEPARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 172-184) is reported at 348 F.3d 308. The opinion of the district court (J.A. 146-171) is reported at 181 F. Supp. 2d 14. A prior opinion of the court of appeals (J.A. 67-91) is reported at 231 F.3d 56. A prior opinion of the district court (J.A. 46-66) is reported at 125 F. Supp. 2d 562.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 2003. A petition for rehearing was denied on November 24, 2003 (Pet. App. B3). The petition for a writ of certiorari was filed on February 23, 2004, and was granted on June 21, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 924, provides in pertinent part:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years * * *.
>
> (2) As used in this section—
>
> * * * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT

Following his plea of guilty in the United States District Court for the District of Massachusetts, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). The district court sentenced him to a term of 46 months of imprisonment, to be followed by three years of supervised

release. J.A. 38, 41. On the government's appeal, the court of appeals vacated petitioner's sentence and remanded for resentencing. J.A. 67-91. This Court denied review. See *Shepard* v. *United States*, 534 U.S. 829 (2001). On remand, the district court imposed the same sentence. J.A. 138-139. On the government's second appeal, the court of appeals again vacated petitioner's sentence and remanded with directions to enhance petitioner's sentence under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e). J.A. 172-184.

1. a. This case involves application of the Armed Career Criminal Act of 1984 (ACCA), as amended, 18 U.S.C. 924(e), to enhance a sentence imposed for possession of a firearm by a felon in violation of 18 U.S.C. 922(g). A violation of Section 922(g) is ordinarily punishable by imprisonment for "not more than 10 years." 18 U.S.C. 924(a)(2). ACCA established an enhanced mandatory-minimum 15-year penalty for persons convicted of illegally possessing a firearm who have three previous convictions for robbery or burglary. Pub. L. No. 98-473, Tit. II, §§ 1801-1803, 98 Stat. 2185 (codified at 18 U.S.C. App. 1202 (1982 & Supp. II 1984)).

Congress enacted ACCA to supplement enforcement efforts against "career" criminals, in recognition of the fact that "a 'large percentage' of crimes of theft and violence 'are committed by a very small percentage of repeat offenders,' and that robbery and burglary are the crimes most frequently committed by these career criminals." *Taylor* v. *United States*, 495 U.S. 575, 581 (1990) (quoting H.R. Rep. No. 1073, 98th Cong., 2d Sess. 1, 3 (1984)). "Congress singled out burglary (as opposed to other frequently committed property crimes such as larceny and auto theft) for inclusion as a predicate offense * * * because of its inherent potential for

harm to persons. The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Id.* at 588; accord *id.* at 581 (burglary is "one of the 'most damaging crimes to society'") (quoting H.R. Rep. No. 1073, *supra*, at 3 (remarks of Sen. Specter)). In the 1984 enactment, Congress specifically defined the terms "burglary" and "robbery" to avoid "the possibility that culpable offenders might escape punishment on a technicality." *Id.* at 582 (quoting S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983)). The statute defined "[b]urglary" as a "felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. App. 1202(c)(9) (1982 & Supp. II 1984).

In 1986, Congress expanded the category of predicate crimes subject to enhancement under ACCA to provide "a greater sweep and more effective use of this important statute." *Taylor*, 495 U.S. at 583 (quoting 132 Cong. Rec. 7697 (1986)). In the amendment, Congress provided enhanced penalties for firearm offenders with three previous convictions of a "serious drug offense" or a "violent felony." Pub. L. No. 99-570, §§ 1401-1402, 100 Stat. 3207-39 to 3207-40 (18 U.S.C. 924(e)). The definition of "violent felony" added by the 1986 amendment, which is still in force, defines the term "violent felony" to include any felony that

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that

presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). Unlike the 1984 statute, the amended statute did not define the term "burglary." The definition in the 1984 statute was omitted from the 1986 amendment, apparently inadvertently. *Taylor*, 495 U.S. at 589-590.

b. In response to confusion stemming from the deletion of the statutory definition, this Court in *Taylor* v. *United States* was "called upon to determine the meaning of the word 'burglary' as it is used in [ACCA]," 495 U.S. at 577. After reviewing the history and text of the statute at length, the Court held that the term connotes "the generic sense in which the term is now used in the criminal codes of most states." *Id.* at 598. The Court thus concluded that "any crime, regardless of its exact definition or label," is a "burglary" (and thus a "violent felony" under ACCA) if it "ha[s] the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.

The Court then briefly discussed how to apply its conclusion to state statutes. 495 U.S. at 599-602. Looking to the text of ACCA and its legislative history, the Court adopted a "categorical" approach to determining whether a prior offense was a generic burglary. Under that approach, the Court said, sentencing courts "generally" should "look only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602. Thus, if a state statute precisely corresponds with the "generic" definition of burglary or is narrower, a conviction under it necessarily qualifies as "burglary" for purposes of ACCA. *Id.* at 599. The Court recognized, however, that some state statutes define burglary more broadly, to cover both conduct that constitutes generic burglary and conduct that does not. *Ibid.* Thus, the Court explained, a single burglary statute might proscribe both breaking into a building, which would constitute "generic" burglary, and breaking into a vehicle, which would not. *Id.* at 602. Under such circumstances, the Court stated, the categorical approach would "permit the sentencing court to go beyond the mere fact of conviction" and thus consider as a predicate offense a conviction for non-generic burglary if, "[f]or example," *ibid.*, "the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." *Ibid.*

2. On October 17, 1995, petitioner sold a Glock model 17 9mm pistol and ammunition to an undercover agent. Petitioner suggested that the agent should remove the serial number from the pistol because it was going to be reported as stolen. See 02-1216 Gov't C.A. Br. 3.

3. On March 3, 1999, petitioner pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). J.A. 68. The principal issue at sentencing was whether petitioner was subject to a 15-year minimum term of imprisonment under ACCA. The district court noted that, "[s]ince 1980, when he was 18 years old, [petitioner] has been on an 18-year crime spree," J.A. 51. Petitioner's criminal history, which includes several convictions for assault and battery and breaking and entering, see J.A. 195-216, is so extensive that his "criminal history score [under the Guidelines] is 39, three times the number triggering Category VI," J.A. 64, the highest available offender category. Relying on four of petitioner's convictions for breaking and entering, the government sought to establish that petitioner was an armed career criminal because he had

been convicted of generic burglary on at least three occasions.[1]

All of the convictions on which the government relied involved guilty pleas by petitioner to felony violations of one of two sections of Chapter 266 of the General Laws of the Commonwealth of Massachusetts (2002): Section 16, which prohibits breaking and entering a "building, ship, vessel or vehicle" in the nighttime with the intent to commit a felony, or Section 18, which prohibits breaking and entering a "building, ship or motor vehicle or vessel" in the daytime with intent to commit a felony. See Pet. Br. 9-10 n.3. The charging documents (criminal complaints) for each of the four convictions specified that petitioner "did break and enter" and possessed the "intent to commit a felony therein."[2] 3 J.A. 5, 15, 21; see also J.A. 204. But the complaints did not explicitly state that the offense involved a building; instead, they tracked the language of the statutes to say that petitioner had broken and entered a "building, ship, vessel or vehicle." 3 J.A. 5; see also 3 J.A. 15, 21; J.A. 173, 204. The government argued that two of the three elements of generic burglary—unprivileged entry and intent to commit a

[1] The government initially argued that the district court should also consider a fifth breaking and entering conviction, arising out of petitioner's April 1989 break-in at the Crispus Attucks Children's Center building. Because the government could not obtain the complaint application and police report for that conviction and had only the PSR's description of the incident, that conviction was not the focus of the government's arguments and will not be addressed further. See J.A. 175 n.2.

[2] For cases in Massachusetts district court, "the 'complaint' * * * is the final step in the charging process, roughly equivalent to a federal information." J.A. 174 (citing 1 Eric Blumenson et al., *Massachusetts Criminal Practice* §§ 4.1-4.2, at 51-59 (1998)).

crime—were established by petitioner's guilty plea to the charging document. J.A. 20-24.

The government further contended that the remaining element of generic burglary (that the conviction involved a building or structure) was demonstrated by examining the complaint applications and incorporated police reports for the four convictions. Under Massachusetts Criminal Procedure, as the court of appeals observed, the complaint is issued by a magistrate "based on a complaint application normally filed by a police officer and likely to incorporate or be accompanied by a police report. The application is customarily sworn and is automatically given to defendants at their arraignments." J.A. 174 (citation omitted) (citing, inter alia, Mass. Super. Ct. Standing Order 2-86; 1 Eric Blumenson et al., *Massachusetts Criminal Practice* §§ 4.2, 16.5(C) at 52, 416 (1998)). The complaints, complaint applications and police reports for the four offenses indicated the following:

> May 1989. The criminal complaint listed the "place of offense" as "30 Harlem St." and charged petitioner with "break[ing] and enter[ing] in the night time the building, ship, vessel or vehicle, the property of Jerri Cothran." 3 J.A. 5. The complaint application identified the victim as "Jerri Cothran 30 Harlem St.," and described the property "stolen [or] destroyed" as "Cellar Door." The complaint application's "other remarks" section stated "B[oston] P[olice] D[epartment] C[riminal] C[omplaint]# 91-394-783." 3 J.A. 6. The incorporated Boston Police incident report, denominated "complaint no. 91-394-783," gave the following recitation of events: "Responded to R.C. [radio call] to 30 Harlem St. for B&E in progress. On arrival observed cellar door in

rear had been broken down. Spoke to victim who stated that approx 3 a.m. she heard noises downstairs. She then observed [petitioner] in her pantry." 3 J.A. 7; see also J.A. 152 n.7.

March 1991. The criminal complaint charged petitioner with breaking and entering in the nighttime, "the building, ship, vessel or vehicle, the property of Fretters." J.A. 204. The police report stated that two managers at Fretter's (an appliance store) saw petitioner, who had been fired a month earlier, enter the rear stockroom door "holding a master key." 3 J.A. 11. Petitioner fled. A quick inventory revealed that four VCRs and three televisions were missing from the stock room. 3 J.A. 11-13; see also J.A. 152 n.7.

July 1991. The criminal complaint charged petitioner with breaking and entering "the building, ship or vessel of Monica Collins," and listed the "place of offense" as "258 Norwell St." 3 J.A. 15. The complaint application identified the victim as "Monica Collins 258 Norwell St." and listed the "[g]oods stolen" as "V.C.R." and "phone/ans. machine." The "other remarks" section said "see c[riminal] c[omplaint] # 11597345." The incorporated Boston Police incident report, denominated "complaint no. 11597345," stated the officers had responded to a radio call for a suspicious person "wearing red shorts and blue shirt in the hallway of 258 Norwell St." When police arrived, they saw petitioner dressed in red shorts and a blue shirt "walking away from above address * * * carrying a pink pillowcase" containing a VCR and a telephone answering machine. 3 J.A. 19. When police

went to Ms. Collins' apartment, they found that a panel on her "front door had been broken in exposing inside door lock. Officers entered Apt. and observed, in livingroom, areas where V.C.R. and phone [answering machine] were taken from. Officers also observed in bedroom one pink pillowcase missing from pillow." Messages retrieved from the answering machine were for Monica Collins. 3 J.A. 17, 19; see also J.A. 152 n.7.

February 1994. The criminal complaint listed the "place of offense" as "145 Gallivan Blvd." and charged petitioner with breaking and entering "the building, ship or motor vehicle or vessel of Russell McGaugh," and with maliciously destroying "the personal property, dwelling house, or building of Russell McGaugh." 3 J.A. 21. The complaint application listed the property "stolen [or] destroyed" as "[r]ear door," and the "other remarks" section stated "[r]ef to c[riminal] c[omplaint] # 41087022." 3 J.A. 22. A police report, denominated "complaint no. 41087022" stated that a neighbor saw petitioner go "to # 145 Gallivan and * * * observed [him] attempting to gain entry by turning several doorknobs." When police arrived they found petitioner at "the rear of the property * * * with both arms through the glass" of the "[r]ear [b]asement door." 3 J.A. 23-24.

Although petitioner did not contest the validity of the convictions, he argued that it was inconsistent with *Taylor*'s "categorical approach," J.A. 243, to look to police reports and complaint applications to determine whether a conviction involved a building and thus was a "generic burglary" covered by ACCA.

The district court acknowledged that petitioner had "hurtl[ed] from place to place, breaking into the first place he sees, breaking into—what was it, a child-care center at one point?," J.A. 34, but nevertheless concluded that the government had not established "three previous convictions" (18 U.S.C. 924(e)(1)) for generic burglary under ACCA. J.A. 46-66. The district court concluded that *Taylor* could be applied to cases involving guilty pleas, but held that complaint applications and police reports could not be considered under *Taylor* to determine the nature of the petitioner's prior convictions because they "contain[ed] allegations that were never adjudicated before a judge or jury, [and] never admitted by [petitioner]." J.A. 59. Instead, the court held that the prosecution must show "plea colloquies or plea agreements * * * to suggest that [petitioner] adopted one version of the facts rather than another." J.A. 60. Although the district court did not apply the ACCA enhancement, in recognition of the fact that petitioner's record "is about as bad as they come," J.A. 30, the court imposed a modest nine-month upward departure from the Guidelines sentence and sentenced petitioner to 46 months of imprisonment.

4. The government appealed, and the court of appeals vacated petitioner's sentence and remanded. J.A. 67-91. The court of appeals held that there is no "absolute bar" to the consideration of complaint applications and police reports when the sentencing court is trying to determine whether a defendant's "pleas of guilty constituted admissions to unlawful entries of buildings." J.A. 89. The court concluded that requiring proof through "a plea agreement or a plea transcript" would "make the use of prior convictions based on guilty pleas for purposes of the ACCA * * * enhancement hinge on the happenstance of state court record-keeping

practices." J.A. 85. To determine whether petitioner's "pleas of guilty constituted admissions to unlawful entries of buildings," J.A. 89, the court of appeals stated that courts should examine whether "the defendant and the government both believe[d] at the time [petitioner] entered his pleas 'that the generically violent crime . . . rather than the gener[ic]ally non-violent crime . . . was at issue.'" J.A. 88 (quoting *United States* v. *Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992) (Breyer, C.J.)). The resolution of that inquiry, the court concluded, can be made on the basis of "sufficiently reliable evidence of the government and [petitioner's] shared belief that [petitioner] was pleading guilty to the unlawful entry of a building." J.A. 91.

5. On remand, the government introduced court records relating to two additional breaking and entering convictions that were listed in petitioner's PSR, both of which were obtained through guilty pleas. See J.A. 175, 195-196, 204. Those records indicated the following:

> February 1981. The criminal complaint charged that petitioner "did break and enter the gymnasium located in the Jamaica Plain High School * * * with the intent to steal and did steal therein athletic clothes." 3 J.A. 2. The complaint application recited the same information, but also described additional items petitioner had stolen. 3 J.A. 3.
>
> October 1990. The criminal complaint charged petitioner with breaking and entering "the building, ship, vessel or motor vehicle of Craig Milanesi," and listed the "place of offense" as "446 Shawmut Ave." 3 J.A. 8. The complaint application stated that petitioner was "observed at the rear of 446 Shawmut on the 2nd floor fire [e]scape[.] Window was fully open

apparently pried open by kitchen knife found on [petitioner]." 3 J.A. 9.

Petitioner submitted an affidavit (see J.A. 100-104) stating that the judges presiding at the four guilty pleas at issue at petitioner's original sentencing in this case had not read the police reports to him, and that petitioner did not admit the truth of the information contained in those incident reports as part of his plea proceedings. J.A. 100-102. He also stated that he had not made an admission in any court to the truth of "the facts set forth in the[] paragraphs" of the PSR relating to five of the six breaking and entering convictions identified by the government as ACCA predicate offenses. J.A. 102-104. Petitioner did not, however, say that he did not admit in state court to breaking and entering buildings in connection with those offenses, nor does his affidavit address the conviction stemming from the October 1990 break-in.

The district court reimposed its original sentence of 46 months of imprisonment. See J.A. 146-171. The district court held that the complaint applications and police reports the government had submitted were not reliable evidence of what offenses petitioner had pleaded guilty to in state court. J.A. 150. The court explained that the government had not refuted petitioner's claim, made in his affidavit, that the police reports underlying his convictions were not read to him in the plea proceedings and that he did not admit to the facts contained in the reports at his plea hearings. J.A. 171. Thus, the court was unable to "conclude by a fair preponderance of the evidence" that petitioner had pleaded guilty to entering buildings unlawfully. *Ibid.*

6. The government again appealed, and the court of appeals again vacated petitioner's sentence and remanded for resentencing. J.A. 172-184. The court held that the district court had "clearly err[ed]" by "find[ing] that [petitioner] did not plead guilty to at least three burglaries of buildings." J.A. 182. The court acknowledged that it is "barely possible" that on occasion, "someone in [petitioner's] position might have pled guilty, not to the charge that underlay the complaint (namely, burglary of a building), but to the burgling of some other venue such as a boat arguably not within the definition of generic burglary." *Ibid.* But the court considered it "nearly impossible" that "anything like it happened for most of [petitioner's] predicate pleas," or that the documents "were mistaken as to venue for four or more of the six crimes." *Ibid.* The court of appeals concluded that, under the circumstances of this case, "[a]bsent * * * evidence of peculiar circumstances, there is a compelling inference that the [guilty] plea was to the complaint and that the complaint embodied the events described in the [complaint] application or police report in the file." *Ibid.* The court noted that petitioner "ha[d] been given a full opportunity * * * to explain any circumstance surrounding the pleas that might defeat the natural inference that the pleas were to the crimes described" in the complaint applications and police reports, J.A. 181-182, but he had not done so, and instead merely said he had not "specifically admitted in open court" to the factual statement in the police reports "and that the underlying police reports were not read to him at the plea hearings." J.A. 182. The court therefore vacated petitioner's sentence and remanded the case with directions to impose the ACCA enhancement. J.A. 183-184.

SUMMARY OF ARGUMENT

When a defendant has pleaded guilty under a state statute that covers both generic and nongeneric burglary, the Armed Career Criminal Act permits district courts to consider complaint applications and incorporated police reports to determine whether the defendant has pleaded guilty to the burglary of a building (and thus to a violent felony). In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court said that a sentencing court may examine a charging document and jury instructions to determine whether the "jury was actually required to find all the elements of generic burglary," *id.* at 602, and every court of appeals with criminal jurisdiction has correctly concluded that a similar inquiry may be conducted to determine the nature of a defendant's guilty pleas. Examining complaint applications and incorporated police reports to determine whether the defendant pleaded guilty to the burglary of a building is consistent with *Taylor*'s purposes and general approach. The underlying purpose of the inquiry is the same as in *Taylor*: to determine the nature of the offense of which the defendant was convicted, rather than to determine what he actually did. And the inquiry that the sentencing court must undertake is comparable in scope to that endorsed by *Taylor*, involving only a limited examination of documents in the state case file.

In this case, two of the three elements of generic burglary ("unlawful or unprivileged entry" with "intent to commit a crime") were necessarily satisfied by petitioner's guilty pleas, because those are elements of the crimes of which petitioner was convicted, see Mass. Gen. Laws ch. 266, §§ 16, 18 (2002), and because the charging documents to which petitioner pleaded guilty

explicitly included those elements. Thus, this case involves only a narrow inquiry into whether the state-court records show that petitioner admitted the third element of generic burglary (that petitioner entered or remained in "a building or structure," rather than a ship or vehicle). That petitioner's conviction for his February 1981 break-in was for the burglary of a building is established by the charging document to which petitioner pleaded guilty, which itself specified that the incident involved breaking into a high-school gymnasium. 3 J.A. 2. Examining the complaint applications and police reports for petitioner's other convictions demonstrates that petitioner's other guilty pleas likewise constituted admissions to breaking and entering buildings.

In light of the presumption of regularity that attends guilty plea proceedings, see *Parke* v. *Raley*, 506 U.S. 20, 29-30 (1992), federal courts can presume compliance with the requirement that "a court may not convict unless there are sufficient facts on the record to establish each element of the offense." *Commonwealth* v. *DelVerde*, 496 N.E.2d 1357, 1363 (Mass. 1986). Here, that factual basis can plausibly have rested only on petitioner's entry of a building. In Massachusetts courts, the factual basis for a guilty plea is usually satisfied by reciting police reports, see 2 Eric Blumenson et al., *Massachusetts Criminal Practice* § 37.7B at 288 (1998). And there is nothing in the record to indicate that petitioner had pleaded guilty based on entering a ship or vehicle on any of the occasions at issue.

Examining complaint applications and incorporated police reports to determine the offense to which a defendant pleaded guilty is fully consistent with *Taylor*. The process at issue here does not require extensive factfinding. Rather, like the procedure specifi-

cally endorsed in *Taylor*, it requires only a narrow examination of state-court documents to determine whether the state court's guilt determination required a finding that the burglary involved a building. Nor does this method of proving the nature of prior burglary convictions pose inherent problems involving the reliability of evidence, because the inquiry is very narrow (whether there is any indication the offense could have involved breaking and entry of anything other than a building) and because the government retains the burden of persuasion at all times. The court of appeals did not shift the burden to petitioner in this case. It noted the commonsense inference that, given the overwhelming indications that petitioner's pleas were for entering a building, in the absence of evidence to the contrary, there was no realistic possibility that petitioner had pleaded guilty to burglary of anything else for four or more of his six prior burglary convictions.

The examination of state-court documents to identify the nature of a plea raises no serious constitutional doubts under this Court's precedents. *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), held that a defendant's prior conviction may constitutionally be treated as a sentencing factor to be found by the sentencing court by a preponderance of the evidence, and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), specifically declined to overrule that decision. Determining the nature of a conviction is not "factfinding" for *Apprendi* purposes, but rather a legal inquiry into what the record indicates about the nature of convictions. Even if that inquiry involves ancillary judicial determinations about whether a conviction is a qualifying predicate under a recidivist statute, every court of appeals that has considered the question has

correctly concluded that such questions are "sufficiently interwoven" with the fact of a prior conviction that "*Apprendi* does not require different factfinders and different burdens of proof" for them. *United States* v. *Santiago*, 268 F.3d 151, 157 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002). Nor does the rule of lenity apply here because petitioner can identify no provision of ACCA that he contends is ambiguous, and *Taylor* has already construed ACCA to permit sentencing courts to consider charging instruments in order to determine whether a conviction under a nongeneric burglary statute was a conviction for generic burglary.

Finally, this Court should reject the invitation of amicus the National Association of Criminal Defense Lawyers (NACDL) to overrule *Almendarez-Torres*. That issue is neither "set out in the petition" nor "fairly included therein," Sup. Ct. R. 14.1(a), and petitioner raised no such claim either before the courts below or in his merits brief in this Court. In any event, the Court in *Apprendi* was correct in declining to disturb *Almendarez-Torres*.

ARGUMENT

THE ARMED CAREER CRIMINAL ACT PERMITS DISTRICT COURTS TO CONSIDER RELIABLE RECORD EVIDENCE SUCH AS COMPLAINT APPLICATIONS AND POLICE REPORTS IN DETERMINING WHETHER A DEFENDANT PLEADED GUILTY TO A BURGLARY OF A BUILDING AND THUS WAS CONVICTED OF A "VIOLENT FELONY"

In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court held that when a defendant had been convicted under a state statute that encompassed both generic and nongeneric burglary, a federal sentencing court determining whether the conviction was for a "violent

felony" under ACCA could look to "the charging paper and jury instructions" to see whether the jury was "required * * * to find all the elements of generic burglary in order to convict the defendant." *Id.* at 602. Although *Taylor* makes clear that federal district courts may look to state-court records to determine the nature of a jury conviction, petitioner contends that permitting district courts to look to complaint applications and incorporated police reports to determine whether a defendant has pleaded guilty to generic burglary violates *Taylor*'s categorical approach, impermissibly allowing "mini-retrials," Pet. Br. 18, and "wide-ranging inquiries into facts underlying a prior conviction," *id.* at 4, based on "stale evidence," *id.* at 27. At times, petitioner appears to suggest even that a conviction under a nongeneric burglary statute can be an ACCA predicate offense only if the offense is adjudicated by a jury. See *id.* at 5, 19, 20, 26; but see *id.* at 20.

Those contentions lack merit. *Taylor* and ACCA permit district courts to "consider other evidence" to determine the basis for a conviction. *Taylor*, 495 U.S. at 600. State court records may permit a federal district court to readily determine that a defendant's guilty pleas under statutes that cover both generic and nongeneric burglary "constituted admissions to unlawful entries into buildings." J.A. 89. And the documents that may be consulted for that purpose include certified copies of complaint applications and incorporated police reports that are part of the state court records. That approach is consistent with the sort of inquiry sentencing courts normally undertake in enhancing sentences for prior convictions, and that practice raises no serious constitutional doubt under this Court's precedents.

A. *Taylor* Permits Courts To Consider Complaint Applications And Incorporated Police Reports To Determine Whether A Guilty Plea Constituted An Admission To Burglary Of A Building

In *Taylor*, this Court briefly addressed how ACCA's categorical approach to classifying predicate offenses would be applied to convictions under different types of statutes. See 495 U.S. at 599-602. The Court specifically discussed the "example" of a conviction under a state burglary law that encompassed both "entry of an automobile" (*i.e.*, nongeneric burglary) "as well as [entry of] a building" (*i.e.*, generic burglary). *Id.* at 602. Under such circumstances, the Court held, a sentencing court validly could "consider other evidence" concerning the defendant's prior convictions. *Id.* at 600. The Court was careful to indicate that the relevant inquiry was not whether "the defendant actually committed a generic burglary," *id.* at 601, but only whether "the defendant had been convicted of" generic burglary. *Id.* at 600. The Court indicated that basing an enhancement on the sentencing court's own determination of the defendant's conduct would be inconsistent with ACCA's focus on the fact of conviction, *id.* at 600-601, would require "an elaborate factfinding process" that ACCA's legislative history had not discussed, *id.* at 601, and would result in "practical difficulties" of proof and "potential unfairness" in circumstances where, for example, a defendant pleaded guilty to a lesser offense but was later subject to an ACCA enhancement imposed "as if the defendant had pleaded guilty to burglary." *Id.* at 601-602. The Court concluded that an inquiry into the nature of the conviction, as opposed to the nature of the conduct, would not present those problems. Accordingly, the Court concluded that the "categorical approach" for classifying predicate

convictions under ACCA "permit[s] the sentencing court to go beyond the mere fact of conviction" where, "[f]or example," "the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." *Id.* at 602. As petitioner himself notes (Pet. Br. 21), *Taylor* prohibits only "an adjudication of facts anew, not a determination of whether those facts were adjudicated below."

1. Taylor Does Not Prohibit Sentencing Courts From Considering Guilty Pleas Under Nongeneric Burglary Statutes As ACCA Predicates

To the extent that petitioner contends that *Taylor* does not permit courts to consider guilty pleas under state burglary statutes that encompass both generic and nongeneric burglary as ACCA predicate offenses, he is mistaken. While *Taylor* itself speaks only of circumstances in which a state-court "jury was actually required to find all the elements of generic burglary" for a predicate offense, 495 U.S. at 602, that passage does not automatically disqualify from enhancement every guilty plea under a nongeneric burglary statute. The principal focus of the *Taylor* opinion (and, indeed, the only subject the government briefed, see 88-7194 U.S. Br. at 11-37) was whether "the word 'burglary' as it is used in [ACCA]," 495 U.S. at 577, meant common-law burglary or modern generic burglary. The Court addressed the application of its definition only briefly at the end of its opinion. *Id.* at 599-602. As then-Chief Judge Breyer observed, *Taylor* is best read as setting forth "an example * * * of *one way* in which a trial court, faced with a past conviction for violating a single statute that covers more than one crime, might decide *which* of those crimes the prior conviction involved."

United States v. *Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992). Particularly since the vast majority of convictions under nongeneric burglary statutes result from guilty pleas rather than jury trials, "[i]t seems unlikely that the Members of Congress, immersed in the intensely practical concerns of controlling violent crime, would have decided" (*Taylor*, 495 U.S. at 593-594) to exclude all plea-based convictions as predicate offenses. Thus, *Taylor* "d[oes] not mean that one who pleads guilty to what would otherwise constitute a 'violent felony' is somehow, for future sentence-enhancement purposes, home free." *Harris*, 964 F.2d at 1236. As the court of appeals noted below, "[a]ll twelve circuits that have addressed the issue have agreed that *Taylor* analysis applies after a guilty plea." J.A. 178 n.4 (collecting authorities).[3]

***2. Examining The Complaint Application And Incorporated Police Report To Determine Whether The Guilty Plea Is An Admission To Unlawful Entry Of A Building Is Consistent With* Taylor**

Examining the complaint application and incorporated police report to determine whether the defendant pleaded guilty to the burglary of a building accords with *Taylor*'s purposes and general approach. The underlying purpose of the inquiry is the same as in

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[3] See, *e.g.*, *United States* v. *Adams*, 91 F.3d 114, 116 (11th Cir.) (collecting decisions from First, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits), cert. denied, 519 U.S. 1047 (1996); *United States* v. *Hernandez*, 218 F.3d 272, 278 (3d Cir. 2000); *United States* v. *Cook*, 26 F.3d 507, 509 & n.5 (4th Cir.), cert. denied, 513 U.S. 953 (1994); *United States* v. *Hill*, 131 F.3d 1056, 1063-1064 (D.C. Cir. 1997) (applying *Taylor* analysis to guilty pleas under Sentencing Guidelines' career offender provision, which employed parallel language); *United States* v. *Palmer*, 68 F.3d 52, 59 (2d Cir. 1995) (same).

examining the charging paper and jury instructions (which the Court endorsed in *Taylor*): to determine the nature of the offense of which petitioner was convicted, rather than to determine what he actually did. Contrary to petitioner's repeated claims, *e.g.*, Pet. Br. 21, 22, 23, the complaint application and police reports are not reviewed "to determine whether the defendant actually committed generic burglary." *Id.* at 20. The court looks to the state-court records "*not* because the court may properly be interested * * * in the violent or non-violent nature of that particular conduct," but because that information "may indicate that * * * the generically violent crime ('building'), rather than the generically non-violent crime ('vehicle') was at issue" in the plea. *Harris*, 964 F.2d at 1236. In addition, the inquiry that the sentencing court undertakes is no broader than that endorsed by *Taylor*. In both instances, the sentencing court examines documents in the case file (there, the charging papers and jury instructions, see 495 U.S. at 602, here, the complaint application and incorporated police report). And in both instances, the court is engaging in logically parallel inquiries: in *Taylor*, whether the finder of fact could have adjudicated guilt only if it "had to find an entry of a building to convict," *ibid.*, and, here, in the context of guilty pleas, whether the defendant's "pleas of guilty constituted admissions to unlawful entries into buildings," J.A. 89. This approach is also consistent with the language of ACCA itself, with its emphasis on the fact of conviction rather than the underlying conduct, *Taylor*, 495 U.S. at 600, and its emphasis on "the elements of the statute of conviction." *Id.* at 600-601.

Petitioner's case illustrates how complaint applications and incorporated police reports can support the conclusion that a defendant pleaded guilty to each of

the elements of generic burglary. Two of the three elements of generic burglary—that petitioner made an "unlawful or unprivileged entry" with "intent to commit a crime," *Taylor*, 495 U.S. at 599—necessarily were satisfied by petitioner's guilty pleas. Those elements are necessary for any conviction under the relevant statutes, see Mass. Gen. Laws ch. 266, §§ 16, 18 (2002), and the charging instruments to which petitioner pleaded guilty explicitly charged those elements. See 3 J.A. 2, 5, 8, 15, 21. By entering a guilty plea, petitioner made an "admission that he committed the crime charged against him." *United States* v. *Broce*, 488 U.S. 563, 570 (1989) (quoting *North Carolina* v. *Alford*, 400 U.S. 25, 32 (1970)); accord *Commonwealth* v. *Rabb*, 725 N.E.2d 1036, 1044 (Mass. 2000) (holding that although tape recording of proceedings was no longer available, "the fact that the * * * judge accepted the defendant's pleas makes it certain that the defendant admitted under oath facts that proved" the offense); *Porter* v. *Superintendant*, 417 N.E.2d 1199, 1203 (Mass. 1981) ("By pleading guilty to a crime * * * , [the defendant] can be presumed to have admitted sufficient facts to establish * * * that crime.").

The third element of generic burglary is that the defendant entered or remained in "a building or structure." *Taylor*, 495 U.S. at 599. For one of petitioner's prior offenses, that fact is established by examining only the charging instrument to which petitioner pleaded guilty. The complaint for petitioner's February 1981 offense, to which petitioner pleaded guilty, charges *only* that petitioner "did break and enter the gymnasium located in the Jamaica Plain High School." 3 J.A. 2. Thus, the only remaining question, to decide whether petitioner had two other qualifying predicate offenses, is whether his other guilty pleas to breaking

and entering were for entry of a building, as opposed to a ship, vessel, or vehicle. The complaint applications and incorporated police reports, considered in light of the role of a Massachusetts judge at a guilty plea, shed crucial light on that issue.

In taking a guilty plea, "a court may not convict unless there are sufficient facts on the record to establish *each element of the offense.*" *Commonwealth* v. *DelVerde*, 496 N.E.2d 1357, 1363 (Mass. 1986) (emphasis added); accord *Commonwealth* v. *Jones*, 799 N.E.2d 601, 602 n.2 (Mass. App. Ct. 2003) (the judge "must * * * ensure that a factual basis exists for each element of the offenses charged") (citing *DelVerde*). See generally Mass. R. Crim. P. 12(c)(5)(A) ("A judge shall not accept a plea of guilty unless he is satisfied that there is a factual basis for the charge."). The records of petitioner's guilty pleas indicate that petitioner "[a]dmit[ted] suff[icient] facts" to support the plea. See 3 J.A. 10, 14, 20; see also 3 J.A. 4 (notes finding of "Guilty" with the notation "SF" for "sufficient facts"). In light of the presumption of regularity that attends guilty plea proceedings, see *Parke* v. *Raley*, 506 U.S. 20, 29-30 (1992), federal courts can presume compliance with the factual basis requirement of petitioner's pleas. And that factual basis can only have plausibly rested on petitioner's entry of a building.[4]

[4] For the first time in any court, petitioner contends (Pet. Br. 23; see also *id.* at 32) that permitting a federal sentencing court to inquire into the nature of a prior conviction "creates a severe due process problem." Although it is unclear precisely what argument petitioner is making, it appears that he contends that he did not have actual notice *at the time of the state plea* that he was pleading guilty to burglary of a building. Petitioner also contends (*id.* at 23) that "he was never charged with" burglary of a building. Those arguments are not properly before the Court, see *United States* v. *Bean*, 537 U.S. 71, 74 n.2 (2002); *TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001), and in any event are without merit. Petitioner had ample notice of the nature of the charge against him in light of the fact that he was arrested for burglary of a building, the Commonwealth sought to obtain a complaint based on that offense, and burglary of a building was undeniably encompassed in each of the criminal complaints to which he pleaded guilty. See generally *Commonwealth* v. *Brown*, 748 N.E.2d 972, 982 (Mass. App. Ct. 2001) (rejecting due process notice claim in part because "information contained in * * * *the police report* enabled the defendant to understand the charge against him and to prepare his defense") (emphasis added).

Several factors give rise to the strong inference that, absent evidence to the contrary, petitioner's guilty pleas constituted admissions to breaking and entering a building. In Massachusetts state courts, "demonstrat-[ing] a factual basis for the plea * * * [u]sually * * * is accomplished by the recitation of either the grand jury minutes or police reports, but defendant's admissions during the plea * * * can also support the factual basis." 2 Eric Blumenson et al., *Massachusetts Criminal Practice* § 37.7B at 288 (1998). In addition, as the defendant, petitioner presumptively was aware of the allegations contained in complaint applications and police reports.[5] See J.A. 174 ("Courts in Massachusetts

[5] Petitioner contends that it was improper for the First Circuit to rely on its "understanding of the complaint and discovery procedures followed" under Massachusetts law in reaching its conclusion, claiming that courts can draw inferences from the requirements of state law only if their understanding of the law is "derived from evidence in the record." Pet. Br. 24; see also *id.* at 33-34 n.15, 36. Petitioner took the opposite position in the court of appeals, where he cited Massachusetts law to support his claim that the complaint application and police report were not part of the complaint and thus could not serve to clarify it. 02-1216 Pet. C.A. Br. 38. In any event, that claim is mistaken. Courts of appeals are presumed to be knowledgeable about the law of the

can presume that defendants know the information contained in police reports."); see Mass. Super. Ct. Standing Order 2-86 (requiring prosecutor to provide "copies of all police reports" to defendant at arraignment); see also Mass. Dist./Mun. Ct. R. Crim. P. 3 (effective 1996) ("At or before arraignment, the court shall ensure * * * that a copy of the police [report] * * * is provided to the defense."). There is nothing in the record to indicate that petitioner entered a ship or vehicle; indeed, the "vehicle" section on each of the police reports is either blank or affirmatively indicates

states over which they have jurisdiction. Because of that, this Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988), because those courts "are better schooled in and more able to interpret the laws of their respective States." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985). The cases petitioner cites (Pet. Br. 24) are not to the contrary. *United States* v. *DiPina*, 178 F.3d 68 (1st Cir. 1999), involved an unspecified juvenile proceeding in family court and records did not indicate whether it was a guilty plea or a plea of nolo contendere; the court of appeals specifically noted that the fact that the case involved a juvenile made admissions during the proceeding especially unreliable. *Id.* at 73-74 & n.8. Under those peculiar circumstances, the court remanded for a determination of what process was followed. *Id.* at 77. *United States* v. *Roberts*, 39 F.3d 10 (1st Cir. 1994), involved a charge of driving under the influence which had been "continued by the state court *without a finding* [of guilt]." *Id.* at 10 (emphasis added). The court remanded for further clarification of the procedures that were followed, stating that under the two-stage state court procedures then in effect (but since abolished), the lack of finality at the first stage *might* make the defendant's admission "unreliable as an admission of guilt." *Id.* at 12. The court noted that a comparable admission at the second stage would have been a binding admission of guilt. *Ibid.* None of those procedural complications is present here.

that the section is not applicable ("N/A"). See 3 J.A. 7, 11, 19, 23. Accordingly, there would have been no basis in the record for the state court to find sufficient facts to support a guilty plea to entering a ship or vehicle. Finally, the forms noting petitioner's guilty pleas for three of his convictions identify the "place of offense" with *the same street address* set forth in the complaint application and police reports, clearly tying the offense of conviction to the events described in those documents.[6] As the court of appeals correctly concluded, those facts give rise to "a compelling inference that the plea was to the complaint and that the complaint embodied the events described in the [complaint] application" and the incorporated police report. J.A. 182. Thus, a review of the court documents indicates that the state court was "required to find all the elements of generic burglary."[7] *Taylor*, 495 U.S. at 602.

As the court of appeals concluded, an absolute bar on considering complaint applications and incorporated

[6] See 3 J.A. 14 (July 1991 break-in at "258 Norwell St."); 3 J.A. 20 (February 1994 break-in at "145 Gallivan Blvd."); see also 3 J.A. 4 (May 1989 break-in at "30 Harlem St.").

[7] Petitioner errs in stating (Pet. Br. 26) that "the prosecutor conceded [that] the issue of whether petitioner had burglarized a building as opposed to some other enclosure was not 'necessarily adjudicated' in his prior plea proceedings." That assertion apparently refers to the government attorney's statement (quoted at *id.* at 25) that "I have no indication of what the plea colloquy determined or what documents were cited at the plea colloquy." J.A. 133. That statement was made in response to the district court's question about whether the police reports were specifically referenced "during the plea colloquy." *Ibid.* The prosecutor clearly argued that the district court "can, in fact, make a determination as to what elements of the statute the defendant entered [his] plea to by looking at" the complaint applications and police reports. J.A. 114; see also J.A. 110, 112.

police reports "would make the use of prior convictions based on guilty pleas * * * hinge on the happenstance of state court record-keeping practices. The enhancement would only apply when a plea agreement or a plea transcript had been preserved that showed a defendant pled guilty to a violent felony." J.A. 85. Limiting the permitted inquiry to plea colloquies and written plea agreements, as the district court did, would frequently make it impossible for the government to pursue enhancements against even the worst offenders, as this case demonstrates. See J.A. 176 (petitioner is "just the kind of burglar whom Congress had in mind in adopting [ACCA]"); J.A. 80 ("[petitioner]'s record is about as bad as they come"). Such a rule would have a particularly grave effect in Massachusetts, where recordings of plea colloquies are routinely destroyed after only a brief retention period.[8] See generally Mass. Special R. of Dist. Ct. 211(A)(4) (requiring retention of recordings of guilty pleas for two and a half years).[9]

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[8] See, *e.g.*, *Commonwealth* v. *Lopez*, 690 N.E.2d 809, 811 & n.3 (Mass. 1998); *Commonwealth* v. *Grant*, 689 N.E.2d 1336, 1338 (Mass. 1998); see also *Raab*, 725 N.E.2d at 1044; *Commonwealth* v. *Gabin*, No. 12069, 2001 WL 1566172, at *3 (Mass. Super. Ct. Dec. 7, 2001).

[9] Numerous courts of appeals have agreed that in considering ACCA or other recidivist enhancements, it is appropriate to consult court records to determine the nature of offenses to which the defendant pleaded guilty. See *United States* v. *Hernandez*, 218 F.3d 272, 279 (3d Cir. 2000) (allowing consideration of "easily produced court documents"); *United States* v. *Coleman*, 158 F.3d 199, 202-203 (4th Cir. 1998) (en banc) (allowing consideration of the "statement of charges" filed by the complaining witness); *United States* v. *Hill*, 131 F.3d 1056, 1063 (D.C. Cir. 1997) (allowing consideration of "various court documents"); *United States* v. *Palmer*, 68 F.3d 52, 59 (2d Cir. 1995) (allowing consideration of "easily produced and evaluated court documents"); see also *United States* v. *Richardson*, 230 F.3d 1297, 1300 (11th Cir. 2000) (per curiam) (permitting district court to examine police reports to determine whether ACCA predicate crimes were "committed on 'occasions different from one another'"), cert. denied, 532 U.S. 983 (2001); *United States* v. *Hudspeth*, 42 F.3d 1015, 1018 n.3 (7th Cir. 1994) (en banc) (same), cert. denied, 515 U.S. 1105 (1995). But see, *e.g.*, *United States* v. *Payton*, 918 F.2d 54, 56 (8th Cir. 1990) (holding that district court erred by looking "beyond the statute, the charging paper and the jury instruction"). The cases cited by amicus (NACDL Br. 24-25), actually support the government's position. *Palmer* relied heavily on amendments to the Sentencing Guidelines that are not implicated here to determine that the district court could not rely on the PSR in determining career offender status under the Guidelines, 68 F.3d at 57, and explicitly stated that courts *could* rely on court documents for the same inquiry. *United States* v. *Demint*, 74 F.3d 876 (8th Cir.), cert. denied, 519 U.S. 951 (1996), looked to state law to clarify whether a charging document alleging "burglary of a camp" involved a "structure" under state law. *Id.* at 877. In *United States* v. *Howze*, 343 F.3d 919, 923 (7th Cir. 2003), the court of appeals looked to unspecified "charging papers" to determine that although the statute of conviction encompassed nonviolent conduct, the defendant was convicted of a form of the offense that presented a risk of violence.

3. Considering Court Documents To Determine If Guilty Pleas Constitute Admissions To Unlawful Entry Of Buildings Does Not Create The Problems Taylor *Sought To Avoid*

Petitioner contends (Pet. Br. 26-27) that *Taylor*'s categorical approach to classifying predicate offenses prohibits district courts from examining complaint applications and incorporated police reports to determine the offense to which a defendant pleaded guilty, and that such an examination creates the "problems [*Taylor*] sought to avoid," *id.* at 26. That is incorrect. The sort of factfinding procedure that *Taylor* found problematic was a de novo determination of whether

"the defendant actually committed a generic burglary." 495 U.S. at 601. That sort of inquiry would involve a review of the actual testimony at trial (or live witnesses presenting the same testimony), which would pose both "practical difficulties" and create "potential unfairness" to defendants who had pleaded guilty to reduced charges only to find themselves again defending against burglary allegations. *Id.* at 601-602. The court of appeals took pains to emphasize that the inquiry at issue here was designed to avoid "enmesh[ing] the district court in the kind of factually disputed 'archeological dig' about the defendant's conduct that *Taylor* guards against, with all the attendant practical difficulties of holding mini-trials on a defendant's prior convictions." J.A. 88. The process at issue here, like that specifically endorsed in *Taylor*, requires only a narrow examination of state-court documents to determine whether the state court's guilt determination required a finding that the burglary involved a building. And looking to court documents to determine the nature of a prior conviction is consistent with the language of ACCA, because (like the inquiry in *Taylor*), it focuses on the elements supporting conviction and the fact of conviction rather than on "the facts underlying the prior convictions." 495 U.S. at 600.

If the court documents indicate that a plea was to generic burglary, ordinarily the only other evidence the district court might receive would be any "countervailing evidence [offered by the defendant] to defeat the inference" that the defendant pleaded guilty to generic burglary. J.A. 182. Typically, as here, the defendant would submit an affidavit. That method of inquiry suffers no more from the "problems associated with old, stale evidence," Pet. Br. 27, than does *Taylor*, which itself contemplates making a determination about

the nature of the offense from looking to documents from the case file of the same vintage, *i.e.*, "the charging paper and jury instructions." 495 U.S. at 602. Contrary to petitioner's repeated claims (Pet. Br. 21, 27, see also NACDL Br. 27-28), this method of proving the nature of prior burglary convictions does not pose inherent problems involving the reliability of evidence, both because of the narrow scope of the inquiry, and because the burden of persuasion at all times rests on the government.

The complaint application and incorporated police report are relevant primarily not as an assertion of the truth of all the facts set forth within them, but because they embody the charges the state was pursuing against the defendant. As the *Harris* court put it, they indicate that "the government * * * believed that the generically violent crime ('building') * * * was at issue," 964 F.2d at 1236. In addition, to be relevant to the determination of whether the crime involved a guilty plea to entering a building, the documents need be reliable only on the issue of whether the incident could have involved breaking and entry of anything other than a building. Cf. *United States* v. *Delgado*, 288 F.3d 49, 56 (1st Cir.) ("the police report 'may not be entirely reliable in all of its aspects,' but 'is entirely reliable' as to 'where the crime was committed'") (quoting district court opinion), cert. denied, 537 U.S. 1062 (2002); cf. generally *Commonwealth* v. *Durling*, 551 N.E.2d 1193, 1200-1201 (Mass. 1990) (noting that state law makes it a crime to file a false police report and noting "the inherent reliability" of police reports). If complaint applications and police reports are ambiguous about whether a vehicle or ship could possibly have been the site of the break-in, they are insufficient to support an enhancement. Nothing in the court of

appeals' opinions suggests that an ambiguous complaint application and police report (that, for example, is unclear about whether a burglary involved a house or rather might have involved a car or boat in the driveway) would be sufficient to support a finding that the conviction was for generic burglary.

4. The Court Of Appeals' Test Does Not Reverse The Burden Of Proof For Demonstrating The Applicability Of ACCA Enhancements

Petitioner contends (Pet. Br. 24-26; see also NACDL Br. 27-28) that the test adopted by the court of appeals impermissibly reverses the ordinary burden of proof and shifts the burden to the defendant to show that the enhancement does not apply. To the contrary, the court of appeals explicitly stated that the government "bears the burden of proving" (J.A. 89 (quoting *United States* v. *Dueno*, 171 F.3d 3, 7 (1st Cir. 1999))) by a preponderance of the evidence that a defendant's "pleas of guilty constituted admissions to unlawful entries into buildings." *Ibid.* The court did not indicate that a presumption would arise that the defendant pleaded guilty to generic burglary from the mere fact that he was arrested for that offense, or the fact that police sought a complaint for that offense.

During the first appeal, the court of appeals set forth an illustrative set of questions the district court could consider in making the determination of whether a complaint application and police report would give rise to such an inference. See J.A. 86. During the second appeal, the court of appeals recognized it was "possible" (though "barely" so (J.A. 182)) that for any one of petitioner's predicate offenses, petitioner "might have pled guilty, not to the charge that underlay the complaint (namely, burglary of a building), but to the

burgling of some other venue such as a boat arguably not within the definition of generic burglary." J.A. 182. Those statements do not indicate, as petitioner claims (Pet. 24), that the court of appeals approved an automatic presumption in every case that a guilty plea necessarily embodies the facts of the police report of a defendant's arrest, which a defendant must rebut to avoid imposition of the enhancement. The court indicated that a "compelling inference" (J.A. 182) arose in this case only because of the overwhelming evidence that the government had produced indicating that petitioner had pleaded guilty in five cases in which the complaint application and incorporated police report clearly indicated that the offense involved burglary of a building (with no reference whatever to ships or vehicles), coupled with a *sixth* guilty plea to a complaint charging *only* generic burglary. While the court recognized that petitioner "[c]onceivably" might have pleaded guilty to a different offense on *one* occasion, the court concluded it was "nearly impossible" that "for four or more of the six crimes," petitioner would have pleaded guilty to a different type of burglary than that for which he had been arrested. J.A. 182. That commonsense observation did not amount to any misapplication of the burden of persuasion. To the contrary, it was only in the face of the evidence adduced by the government that the court concluded that petitioner's predicate convictions had satisfied the requirements of ACCA, in the absence of any "countervailing evidence to defeat the inference" that he had pleaded guilty to generic burglary. *Ibid.*

The court of appeals did not place exorbitant demands on petitioner. For example, petitioner could have filed an affidavit in which he swore that on the occasions in question, he had pleaded guilty to the

burglary of a ship or vehicle nowhere mentioned in the complaint application or police report. See J.A. 117 (prosecutor states that it would have been sufficient for petitioner to state that "[a]t the time of my plea I told them it was not a building, it was a car," or even "I contested it in some way"). If the district court reasonably credited that affidavit, ACCA would not have applied. Petitioner, however, simply said that he had not at the time of the pleas "admit[ted] the truth of the information *contained in the [police] report[s].*" J.A. 100 (emphasis added); see also J.A. 182. Because there was "no * * * evidence" (J.A. 182) to rebut the inference that petitioner had pleaded guilty to generic burglary, the court of appeals correctly concluded that petitioner's convictions satisfied the requirements of ACCA.[10]

B. The Doctrine Of Constitutional Doubt Does Not Require Adoption Of Petitioner's Construction

Relying on *Jones* v. *United States*, 526 U.S. 227 (1999), petitioner argues (Pet. Br. 29-35), for the first time in any court, that the doctrine of "constitutional doubt" requires this Court to construe ACCA not to

[10] Indeed, the court of appeals gave an unduly generous interpretation to petitioner's affidavit, saying that in it, petitioner said that "he had not specifically admitted in open court to breaking into houses and that the underlying police reports were not read to him at the plea hearings." J.A. 182. In fact, petitioner stated only that the judges presiding at his plea proceedings had not read the police report to him, "did not ask him whether or not the information contained in the [police] report was true," and that he "did not admit the truth of the information contained in the [police] report as part of my plea." J.A. 100. But stating that he did not confirm the accuracy of the *entire police report* in open court is a far cry from saying that he did not admit to breaking and entering a building.

permit inquiry into the nature of a conviction obtained by guilty plea. Petitioner contends that judicial determinations about the nature of a defendant's prior offenses raises "grave and doubtful" (Pet. Br. 35) constitutional questions in light of this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), in which the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Petitioner contends that the doctrine of constitutional doubt requires the court to construe ACCA in his favor to avoid addressing the question whether Congress may constitutionally draft a criminal statute that predicates an enhanced penalty on a judicial determination of the nature of a defendant's prior convictions. Petitioner has not, however, raised a claim in this Court that judicial determination of the nature of his prior convictions would actually be unconstitutional. Nor did he raise such a claim before the court of appeals or in his certiorari petition. Therefore, any such claim "is not properly before" this Court. *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981).

The doctrine of constitutional doubt does not assist petitioner. That doctrine applies only if a statute is "genuinely susceptible to two constructions after * * * its complexities are unraveled" using other interpretive tools, and one resolution of the ambiguity would raise a serious constitutional question. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998). There is no grave doubt under current law (or the law at the time ACCA was enacted) about the constitutionality of having a judge determine the nature of a prior conviction. In *Almendarez-Torres*, this Court held that a defendant's prior conviction may constitutionally be

treated as a sentencing factor to be found by the sentencing court by a preponderance of the evidence, rather than an element of the offense to be found by the jury beyond a reasonable doubt, even when the court's finding serves to increase the defendant's sentence beyond the otherwise-applicable statutory maximum. See 523 U.S. at 239-247; see also *id.* at 243-244 (noting long tradition of judges using prior convictions as sentencing factors). Indeed, *Almendarez-Torres* cited ACCA as an example illustrating that "prior commission of a serious crime * * * is as typical a sentencing factor as one might imagine." *Id.* at 230.

Although the Court in *Apprendi* found it to be "arguable that *Almendarez-Torres* was incorrectly decided," 530 U.S. at 489, it specifically declined to overrule that decision. *Id.* at 487-490; see *id.* at 490. Just last Term, this Court noted that "[w]e have not extended [*In re*] *Winship's* protections to proof of prior convictions used to support recidivist enhancements." *Dretke* v. *Haley*, 124 S. Ct. 1847, 1853 (2004) (citing, inter alia, *Almendarez-Torres*); see also *Blakely* v. *Washington*, 124 S. Ct. 2531, 2536 (2004) (restating *Apprendi* rule that exempts "the fact of a prior conviction"). In the face of those decisions, it is not surprising that petitioner does not even cite *Almendarez-Torres*, much less challenge its continuing validity. In any event, this Court does not employ the canon of constitutional avoidance to revisit one of its binding precedents. See *Harris* v. *United States*, 536 U.S. 545, 555-556 (2002). The canon instead provides a tool for statutory construction that "rests upon our respect for Congress, which we assume legislates in the light of constitutional limitations.'" *Id.* at 556 (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991)). The canon has no role to play when this Court's decisions and the law at

the time Congress acted demonstrate the absence of constitutional doubts. *Ibid.* The constitutional avoidance canon accordingly provides no reason to construe ACCA to prohibit district courts from examining state court records to determine the nature of a prior conviction.

Petitioner suggests (Pet. Br. 32) that the approach taken by the court of appeals "would *require* the sentencing court to find facts beyond those adjudicated in the prior guilty plea in order to determine whether that plea was for a generic burglary." Here, he contends, the court of appeals made "findings of fact * * * regarding the underlying conduct and the plea proceedings, as well as findings concerning Massachusetts state court procedures." Pet. Br. 34. Having a district court find such facts, petitioner claims, would implicate *Apprendi*. *Id.* at 34-35. That claim is without merit.

As explained above, see pp. 22-23, *supra*, determining the nature of a prior conviction involves only an assessment of what the state court itself already has been "required to find," *Taylor*, 495 U.S. at 602, in order to find the defendant guilty of the crime charged. As with the inquiry specifically condoned by *Taylor* into the charging document and jury instructions, it is a largely legal assessment of the effect of documents in the court file, and of whether, given those documents, the factfinder was "required to find" the defendant committed burglary of a structure to convict. Examination of the meaning of the court files is not "factfinding" for *Apprendi* purposes, but rather a legal inquiry into what the record indicates about the nature of convictions. Thus, because an inquiry into the nature of a guilty plea is the "same determination" involved in

Taylor, *Harris*, 964 F.2d at 1236, petitioner's constitutional doubt argument fails.[11]

Even if petitioner were correct that determining the crime to which a defendant has pleaded guilty requires ancillary judicial determinations about the nature of prior convictions, it would not raise "[g]rave and doubtful questions" (Pet. Br. 34) about the validity of the practice under current law. *Taylor* itself authorized courts to undertake a comparable inquiry to classify prior convictions, which even petitioner concedes is not properly considered *Apprendi* "factfinding." See Pet. Br. 33. Every court of appeals that has considered the question has held that "*Apprendi* * * * leav[es] to the judge, consistent with due process, the task of finding not only the mere fact of previous convictions but other related issues as well" relating to prior convictions. *United States* v. *Santiago*, 268 F.3d 151, 156 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002). Thus, courts have unanimously concluded that *Apprendi* and *Almendarez-Torres* permit not only a narrow inquiry into "the fact that a prior conviction exists, but also a determination of whether a conviction is one of the enumerated types qualifying for the sentence enhancement" even if it requires "the finding of facts beyond the mere fact of conviction." *United States* v. *Kempis-Bonola*, 287 F.3d 699, 703 (8th Cir.) (determination whether a prior conviction is "aggravated" felony under

[11] Petitioner errs in suggesting (Pet. Br. 29) that the *Taylor* opinion itself expressed constitutional doubt about having the sentencing court determine the nature of the prior conviction. In passing, *Taylor* raised a question about the distinct issue of the sentencing court "conclud[ing], from its own review of the record, that the defendant actually committed a generic burglary." 495 U.S. at 601. As explained above, see pp. 22-23, *supra*, that issue is not presented here.

8 U.S.C. 1326) (internal quotation omitted), cert. denied, 537 U.S. 914 (2002). The courts of appeals likewise uniformly have held that *Apprendi* permits judicial determination of whether offenses qualify as predicate offenses under ACCA[12] and the federal three-strikes statute,[13] and whether offenses are "aggravated" felonies under 8 U.S.C. 1326(b)(2).[14] And every court of appeals that has considered the question has concluded that judges may validly determine whether ACCA predicate offenses were "committed on occasions different from one another," although the inquiry requires consideration of "the nature of the crimes, the identities of the victims, * * * the locations, and * * * whether the crime involved distinct criminal aggressions." *United States* v. *Morris*, 293 F.3d 1010, 1013 (7th Cir.), cert. denied, 537 U.S. 987 (2002); accord *United States* v. *Stone*, 306 F.3d 241, 243-244 (5th Cir. 2002); *Santiago*, 268 F.3d at 155. The cases cited by petitioner (Pet. Br. 32) are not to the contrary.[15]

[12] *United States* v. *Campbell*, 270 F.3d 702, 708 (8th Cir. 2001) (rejecting claim that *Apprendi* applies to determination of predicate offenses under ACCA because application requires "a 'complex series of factual findings' to determine whether or not prior offenses constitute violent felonies or serious drug offenses"), cert. denied, 535 U.S. 946 (2002).

[13] *United States* v. *Gatewood*, 230 F.3d 186, 191-192 (6th Cir. 2000), cert. denied, 534 U.S. 1107 (2002).

[14] See, *e.g.*, *Kempis-Bonola*, 287 F.3d at 703; *United States* v. *Martinez-Garcia*, 268 F.3d 460, 463-465 (7th Cir. 2001), cert. denied, 534 U.S. 1149 (2002).

[15] Petitioner cites (Pet. Br. 32) both *United States* v. *Cooper*, 375 F.3d 1041 (10th Cir. 2004), and *United States* v. *Sanders*, 377 F.3d 845 (8th Cir. 2004), for the proposition that "[l]imiting *Taylor*'s reach to the fact of conviction as determined by categorical approach cabins § 924(e) within the confines of the *Apprendi-Blakely* exception." Both cases merely restate the proposition that the

The courts of appeals have correctly concluded that inquiry into the fact of a prior conviction under *Apprendi* and *Almendarez-Torres* extends to ancillary determinations about whether a conviction is a qualifying predicate under the statute. As this Court has noted, recidivism has long been considered a distinct issue because "recidivism 'does not relate to the commission of the offense, *but goes to the punishment only*.'" *Almendarez-Torres*, 523 U.S. at 244 (quoting *Graham* v. *West Virginia*, 224 U.S. 616, 629 (1912)); see also *Nichols* v. *United States*, 511 U.S. 738, 747-748 (1994). For the same reasons that this Court has properly held that recidivism is a sentencing factor that may be determined by a sentencing judge, see pp. 44-45, *infra*, any ancillary determinations about whether a prior conviction is properly classified as an ACCA predicate are "sufficiently interwoven" with the fact of a prior conviction that "*Apprendi* does not require different fact-finders and different burdens of proof for Section 924(e)'s various requirements." *Santiago*, 268 F.3d at 157.

C. The Rule Of Lenity Does Not Compel Adoption Of Petitioner's Construction

Petitioner contends (Pet. Br. 35-37) that the rule of lenity requires holding that ACCA applies only to convictions under generic burglary statutes and convictions for predicate offenses obtained after jury trials.

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indictment and jury-trial requirements of *Apprendi* do not apply to "the fact of a prior conviction," *Cooper*, 375 F.3d at 1052 n.3; *Sanders*, 377 F.3d at 847 n.3, but neither indicates that "the fact of a prior conviction" should be read narrowly. Indeed, *Cooper* rejected the argument that *Apprendi* required jury factfinding about whether the defendant was actually the person named in prior convictions. 375 F.3d at 1053.

Although petitioner's argument is unclear, it appears that petitioner does not contend that ACCA itself is ambiguous; rather, he contends that to the extent that "the Massachusetts [state] breaking and entering statutes * * * are ambiguous as to whether they constitute generic crimes," under the rule of lenity, "they [should] be interpreted as non-generic crimes and no further inquiry would be required." Pet. Br. 36. That argument lacks merit.

The rule of lenity has no application here because this case does not involve the construction of ambiguous statutes. See *Albernaz* v. *United States*, 450 U.S. 333, 343 (1981) ("the rule of lenity simply has no application" where court is "not confronted with any statutory ambiguity"). There is no need to construe the Massachusetts state statutes in this case (even if federal courts could do so authoritatively): the prohibitions and penalties of the Massachusetts breaking and entering statutes are clear and well established. Petitioner points to no provision of ACCA that he contends is ambiguous so as to permit the rule to be invoked here, and ACCA's language does not itself prescribe procedures for the imposition of the enhancement. Sentencing Guidelines § 4B1.4, comment. (n.1) ("the procedural steps relative to the imposition of an enhanced sentence under 18 U.S.C. § 924(e) are not set forth by statute"). Moreover, this Court in *Taylor* has already construed ACCA to permit sentencing courts to consider charging instruments in order to determine whether a conviction by jury under a statute that covered both generic and nongeneric burglary was a conviction for generic burglary, and petitioner identifies no textual basis for drawing a different conclusion here. The *Taylor* Court did not suggest that it was unclear whether the language of ACCA would permit such a procedure. 495

U.S. at 602. The Court's failure to consider the rule in that context is a strong indication it believed the rule was not implicated, because the Court twice specifically addressed whether the rule of lenity played any role in determining the meaning of the word "burglary" in the statute. *Id.* at 596, 598.

D. The Continuing Validity Of *Almendarez-Torres* Is Not Before This Court

Amicus the National Association of Criminal Defense Lawyers contends (Br. 6-22) that *Almendarez-Torres*, *supra*, was wrongly decided. NACDL further contends that the decision has been undercut by *Apprendi*, *supra*, and its progeny, and that this Court should overrule the decision. For several reasons, this Court should decline that invitation. First, under this Court's Rule 14.1(a), only a question that is "set out in the petition" or "fairly included therein" will be considered by the Court. The petition presents only questions concerning the kinds of materials a sentencing court may consult to determine whether a prior burglary conviction was for a generic burglary, see Pet. i-ii, and specifically indicated that "[n]o constitutional provision is involved" in this case. Pet. 1. Nor is the question "fairly included." Amicus does not contend otherwise, indicating that the validity of *Almendarez-Torres* is an additional issue to be decided "as well as the *Taylor* issue on which certiorari was granted." NACDL Br. 2. See generally *Yee* v. *Escondido*, 503 U.S. 519, 535 (1992) (Court "disregard[s] [this rule] 'only in the most exceptional cases,' where reasons of urgency or of economy suggest the need to address the unpresented question in the case under consideration") (quoting *Stone* v. *Powell*, 428 U.S. 465, 481, n.15 (1976)). Second, petitioner presented no comparable claim in the courts

below. See 02-1216 Pet. C.A. Br. 1-46; 99-2167 Pet. C.A. Br. 1-19. See generally *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). Finally, this Court "do[es] not ordinarily address issues raised only by *amici*." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991). There is no reason for the Court simultaneously to depart from all of those sound practices in this case.

In any event, the Court in *Apprendi* was correct in declining to disturb *Almendarez-Torres*. As the Court stressed in *Almendarez-Torres*, that case involves recidivism, which is "as typical a sentencing factor as one might imagine." 523 U.S. at 230 (citing, among other statutes, 18 U.S.C. 924(e)). Principles of notice and fundamental fairness do not require that prior convictions be alleged in the indictment or found by a jury in order for the defendant to be sentenced to a longer term as a recidivist. A defendant cannot claim surprise concerning the fact of a prior conviction, because he previously underwent the criminal process that led to the judgment.

In addition, as the Court observed in *Apprendi*, "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt"—which *Almendarez-Torres* permits—and allowing a judge rather than a jury to find in the first instance facts that "relate to the commission of the offense itself." 530 U.S. at 496 (internal quotation marks omitted). Indeed, "unlike virtually any other consideration used to en-

large the possible penalty for an offense, * * * a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249; accord *Apprendi*, 530 U.S. at 488 (noting "certainty" in *Almendarez-Torres* that "procedural safeguards attached to any 'fact' of prior conviction"). Extension of *Apprendi* to the fact of prior convictions also would disserve future defendants' interests by bringing their prior criminal misconduct to the attention of jurors. "As this Court has long recognized, the introduction of evidence of a defendant's prior crimes risks significant prejudice." *Almendarez-Torres*, 523 U.S. at 235; *Old Chief* v. *United States*, 519 U.S. 172, 185 (1997) ("there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant"); *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967) (evidence of prior crimes "is generally recognized to have potentiality for prejudice"); cf. also *id.* at 563-564 (Due Process Clause does not require bifurcated proceeding when jury resolves recidivist sentencing issues).

Finally, this Court has repeatedly denied review in cases that (unlike this case) fairly presented the question whether *Almendarez-Torres* should be overruled in light of *Apprendi*, most recently just two weeks before the writ of certiorari was granted in this case.[16]

[16] See, *e.g.*, *Pineda-Cortes* v. *United States*, 124 S. Ct. 2813 (2004) (No. 03-9287); *Garza-Garza* v. *United States*, 124 S. Ct. 2096 (2004) (No. 03-8730); *Garcia-Saldivar* v. *United States*, 124 S. Ct. 2067 (2004) (No. 03-8536); *Meza-Gonzalez* v. *United States*, 124 S. Ct. 2017 (2004) (No. 03-8468); *Sanchez-Medina* v. *United States*, 124 S. Ct. 1655 (2004) (No. 03-7510); *Lapsley* v. *United States*, 124 S. Ct. 1409 (2004) (No. 03-7331); *Jones* v. *United States*, 124 S. Ct. 1145 (2004) (No. 03-6784); *Hitt* v. *Kansas*, 537 U.S. 1104 (2003) (No. 01-10864); *Bradshaw* v. *United States*, 537 U.S. 1049 (2002) (No. 02-5015); *Hagen* v. *United States*, 537 U.S. 828 (2002) (No. 01-9064); *Gray* v. *United States*, 536 U.S. 963 (2002) (No. 01-8724); *Luzardo* v. *United States*, 536 U.S. 962 (2002) (No. 01-6491); *Lozano-Ortiz* v. *United States*, 535 U.S. 1113 (2002) (No. 01-8092); *Ford* v. *United States*, 535 U.S. 1098 (2002) (No. 01-7399); *Bulgin* v. *United States*, 535 U.S. 1095 (2002) (No. 01-742); *Reyes* v. *United States*, 535 U.S. 932 (2002) (No. 01-6151).

Under the circumstances, it would be extraordinary for this Court to address a question of such potential significance—which could affect tens of thousands of sentences—in a case in which the question was not raised in the petition for a writ of certiorari (or even in petitioner's merits brief), and when the question has not been the subject of full briefing by the parties.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

REGINALD SHEPARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF

I. *SHEPARD IV* IS INCONSISTENT WITH BOTH THE HOLDING AND THE RATIONALE OF *TAYLOR*.

The rule announced in *Taylor v. United States*, 495 U.S. 575 (1990), is clear. Where a defendant has previously been convicted under a non-generic burglary statute, that conviction may only serve as a predicate offense under the Armed Career Criminal Act ("ACCA") if the sentencing court can conclude with certainty that all of the elements of generic burglary had been *adjudicated*. *See id.* at 602. Respondent does not dispute this. *See, e.g.*, Resp. Br. 15. In the case of a jury trial, this Court explained that a sentencing court may reach this conclusion by reviewing only the charging document and the jury instructions to determine if the jury "was actually required to find all the elements of generic burglary." *Taylor*, 495 U.S. at 602. For example, if a State's burglary statute includes entry of a car or a building, a conviction under that statute could be used for enhancement only if it could be shown that the jury "necessarily had to find entry of a building to convict" based on the "indictment or information *and* jury instructions." *Id.* (emphasis added).

Where a conviction has been obtained by a guilty plea, a sentencing court is likewise required to make a determination that each element of generic burglary has been adjudicated in order for that conviction to qualify as a predicate offense. Respondent does not dispute this either. Resp. Br. 17, 23. But Respondent argues that the *Harris* question – whether, at the time of the state court pleas, the defendant and the government both believed that generic burglary was at issue – is equivalent to the *Taylor* inquiry of whether all the elements of generic burglary were necessarily adjudicated. The issues then – and where Respondent and Petitioner part ways – are [1] whether the *Harris* question is the equivalent of the *Taylor*

question, [2] what information a sentencing court may examine to determine whether all the elements of generic burglary were actually adjudicated, and [3] whether the burden of proof on that issue was improperly shifted to the defendant by the First Circuit.

Respondent contends that *Taylor* may be read to require a sentencing court to draw inferences from the "state case file" to conclude that the necessary elements had been adjudicated. Resp. Br. 15; *see also United States v. Shepard*, 348 F.3d 308, 312 (1st Cir. 2003) ("*Shepard IV*"); JA 178-79 (stating that under *Taylor*, a burglary conviction constitutes a crime of violence under the ACCA "even if the indictment were silent as to the venue so long as the case files showed that the plea was to burglary of a house"). Examination of the documents in the state court file (such as police reports and complaint applications) is useful only if the inquiry is shifted from what elements were actually adjudicated by the convicting court to the conduct underlying the conviction. *Taylor* flatly prohibits this inquiry. 495 U.S. at 600-02.

In the guilty plea context, *Taylor* allows sentencing courts to look only to those documents that reveal what elements were necessarily found by the trier of fact or admitted by the defendant.[1] This elements analysis corresponds to the review

[1] Most Courts of Appeals to have considered the application of the *Taylor* exception in the guilty plea context have agreed with Petitioner's analysis. They have held that where a prior conviction is based on a guilty plea under a nongeneric statute, only the charging document and court documents that are the functional equivalent of jury instructions can be consulted to identify the elements necessarily determined in the conviction. *See, e.g., United States v. Payton*, 918 F.2d 54, 55-56 (8th Cir. 1990) (prohibiting the use of police reports in the context of a guilty plea). The documents considered have included: a signed guilty plea and transcript from plea proceedings, *United States v. Bonat*, 106 F.3d 1472, 1476 (9th Cir. 1997); a plea agreement, *United States v. Gallman*, 907 F.2d 639, 645 n.7 (7th Cir. 1990); a plea transcript, *United States v. Maness*, 23 F.3d 1006, 1009-10 (6th Cir. 1994); factual findings of the state court following the plea, *United States v. Rutherford*, 54 F.3d 370, 372 n.4 (7th Cir. 1995); or some combination of these, *United States v. Hill*, 131 F.3d 1056, 1065 (D.C. Cir. 1997).

of charging documents and jury instructions in jury trial convictions. The examination of any other evidence (such as police reports) requires that the sentencing court engage in the very factfinding prohibited by *Taylor*. Contrary to Respondent's argument, Resp. Br. 18, the police incident reports and complaint applications are not "record evidence." The district court found on uncontested evidence that they played no part in the guilt adjudications.[2] *United States v. Shepard*, 181 F. Supp. 2d 14, 23-26 (D. Mass. 2002) ("*Shepard III*"); JA 160-65.

The First Circuit's analysis requires the sentencing court to determine what the conduct underlying the defendant's prior convictions was, and uses that conduct to establish, not whether he was necessarily found guilty of all of the elements of generic burglary, but whether he and the prosecutor probably believed that generic burglary was at issue. This is not a categorical analysis, and *Taylor* explicitly prohibits this inquiry. 495 U.S. at 600-602.

A. The *Shepard* Analysis Requires Fact Finding Contrary to *Taylor*'s Prohibition.

The *Shepard* analysis side-steps *Taylor*'s categorical analysis by requiring the sentencing court to find the facts regarding the conduct underlying the defendant's nongeneric convictions. Respondent argues that this approach is consistent with *Taylor* and the ACCA because [1] in both

[2] The First Circuit conceded that the district court's findings, based on Petitioner's uncontested affidavit, were responsive to the issues identified in its remand order, *United States v. Shepard*, 231 F.3d 56, 68 (1st Cir. 2001) ("*Shepard II*"); J.A. 86, 91; *Shepard IV*, 348 F.3d at 314 n.6; J.A. 183 n.6. But in its evaluation of Petitioner's affidavit, the court did not acknowledge that it had changed the subject from what role the police incident reports played in the plea proceeding, to whether Petitioner had rebutted the "natural inference" that "the pleas were to *the crimes described in the case files*." *Id.* at 314; J.A. 182 (emphasis added).

analyses, the sentencing court "examines documents in the case file"; [2] the inquiries are "logically parallel"; and [3] both analyses emphasize "the fact of conviction" and "the elements of the statute of conviction." Resp. Br. 23. None of these claims withstands critical analysis.

Taylor's categorical analysis requires identifying the elements of the crime of conviction and comparing them to the elements of generic burglary. 495 U.S. at 602. Nothing in *Taylor* supports the argument that whatever "documents in the case file" happen to be available can be consulted for this purpose. *Taylor*'s preferred source is the statute of conviction; when the statute is nongeneric, the charging document and jury instructions can be examined only to identify the elements of the conviction. *Id.* Petitioner contends that the Court's specification of the charging document and jury instructions was meaningful and deliberately narrow. The jury instructions readily lend themselves to categorical analysis and can be expected to provide undisputed information: they either require the jury to find all of the elements of generic burglary or they do not. The jury instructions are prepared by the judge and are presumed to have guided the jury's decision-making. Thus, they are the product of the adversary process, which has a tendency to narrow the focus of the charging documents. They are contemporaneous to the adjudication and so are likely to reflect accurately the elements of conviction and to be authentic.

The police incident reports share none of these qualities. They were found to have been unrelated to the adjudications in Petitioner's cases. Nothing in them states the elements of conviction. In Massachusetts state district court practice, they do nothing more than provide the clerk with information from which to prepare the complaint. The complaint is the document used in the courtroom. *Commonwealth v. Arias*, 778 N.E.2d 523, 527-28 (Mass. App. Ct. 2002). Most of the facts stated in them do not find their way into the charge

stated in the complaints. The complaints do not frame the elemental terms of the litigation, much less specify what elements the defendant necessarily admitted or the judge necessarily found in the guilty plea. The police incident reports are useless for categorical analysis because they do not conclusively establish what the elements of conviction were. They are useful only for factual analysis, which Taylor prohibits.[3] *United States v. Payton*, 918 F.2d 54, 55-56 (8th Cir. 1990) (on remand after reversal in light of *Taylor*, disallowing the use of a police report to establish guilty plea as generic burglary conviction); *United States v. Allen*, 282 F.3d 339, 343 (5th Cir. 2002); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1212-13 (9th Cir. 2002) (en banc).

The *Taylor* and *Shepard* inquiries are not equivalents. *Taylor* prescribes a simple method of identification of the elements of conviction from either the statute of conviction or the adjudicated elements of conviction as set out in the charging document and jury instructions, or other contemporaneous court records of the conviction. It is fair, uniform and readily produces unequivocal results. It avoids all inquiry into the defendant's underlying conduct. *See United States v. Shepard*, 125 F. Supp. 2d 562, 570 & n.14 (D. Mass. 2000); J.A. 60 & n.14. The litigation in this case vividly demonstrates that the *Shepard* analysis is neither categorical, nor simple, and it invites speculative judgments, which can reflect the district or appellate court's policy preferences. *Shepard IV*, 348 F.3d at 311, 314-15; J.A. 176-77, 183. It is founded on a post-hoc determination of the

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[3] The First Circuit's holding is not merely that the police reports must be considered, but that, absent extraordinary circumstances established by the defendant, they are conclusive. *Shepard IV*, 348 F.3d at 314; J.A. 182. As a practical matter, this means that the sentencing court is powerless to require plea colloquies or other more authoritative and contemporaneous court documents unless the defendant effectively challenges the facts in the police reports. *Shepard II*, 231 F.3d at 69; J.A. 88-89.

defendant's underlying conduct and not the adjudicated elements of conviction.

Because the First Circuit treats the nongeneric guilty plea inquiry as just another sentencing matter, the "necessarily found" standard of *Taylor* does not apply to it:

> The concept of a necessary finding does not apply to disputes about the meaning of a defendant's guilty plea, and whether that plea constitutes an admission to a violent felony or a crime of violence. As we have indicated, those disputes must be resolved by a finding of fact pursuant to the preponderance of the evidence standard. Such a finding is not a necessity. It is based on a judgment about the weight of the evidence.

Shepard II, 231 F.3d at 68-69; J.A. 89. Moreover, the sentencing judge's determination that the defendant and the government both believed that generic burglary was at issue in the state court guilty plea need not "be based on adjudicated or specifically admitted facts." *Compare id.* at 70; J.A. 91, *with United States v. Franklin*, 235 F.3d 1165, 1173 (9th Cir. 2000) ("[T]he government must prove that the defendant by plea admitted to all of the elements of generic burglary."), *and United States v. Dueno*, 171 F.3d 3, 7 (1st Cir. 1999) (enhancement permitted only for "prior crimes of which he has been convicted – either by a trier of fact or by his own admission"). Thus, the First Circuit's analysis does not require a determination that all of the elements of generic burglary have necessarily been admitted or adjudicated, which is the fundamental objective of *Taylor*'s categorical analysis.

The proposition that the "building" element of generic burglary was necessarily adjudicated in Petitioner's guilty pleas is presumed in the *Shepard* analysis. The district court found that this issue was not addressed in the state court

proceedings.[4] *Shepard III*, 181 F. Supp. 2d at 23-26; J.A. 161-62, 165. The district court record established only that Petitioner was charged with nongeneric crimes and pleaded guilty. The presumption of regularity does not advance Respondent's argument. It is a burden-shifting procedural rule, which comes into play only when a defendant collaterally attacks the validity of a conviction that has become final. *Parke v. Raley*, 506 U.S. 20, 24 (1992). Even employed as Respondent advocates, it does not establish that any particular factual basis was recorded in Petitioner's pleas. Nothing in the record supports the assumption that the state court was required to, or did require an admission to, or make a finding of entry of a building. The only thing Judge Gertner could be certain of was that Petitioner pleaded guilty to breaking and entering some property. The First Circuit found that it was unnecessary to determine whether the "building" element was necessarily adjudicated because it was established by that court's finding that Petitioner actually committed generic burglary. *Shepard IV*, 348 F.3d at 314; J.A. 182. This method of applying the ACCA is prohibited outright by *Taylor* and this Court should not countenance it.

B. The *Shepard* Analysis Improperly Required The Petitioner To Rebut A "Compelling Inference" That He Pleaded Guilty To The Conduct Described In The Police Incident Reports.

Respondent does not contend that the judgments of conviction, standing alone, meet its burden of proving that Shepard had been convicted of three or more "violent felonies" for purposes of the ACCA enhancement. In fact, Respondent made plain that it could not satisfy its burden unless the factual allegations in the police reports and complaint applications were taken into account by the district judge. Resp. Br. 24. *Shepard II* required the sentencing court

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[4] The soundness of this proposition was discussed at length in the district court. J.A. 116-19, 128.

to consider the police reports in making the enhancement determination; no other kind of documentary evidence was ever offered by Respondent in support of its enhancement argument. However, the question to be answered by reference to Respondent's documents was not the *Taylor* question – whether Shepard's prior convictions "necessarily" implied that he had been found guilty of all the elements of generic burglary – but the *Harris* question: "did the defendant and the government both believe at the time Shepard entered his pleas 'that the generically violent crime . . . rather than the generally non-violent crime . . . was at issue.'" *Shepard II*, 231 F.3d at 68-69; J.A. 88.

To answer the *Harris* question, the First Circuit created an inference from the hearsay statements in the police incident reports that the conduct described therein was in the defendant's consciousness at the time he entered his plea.[5] The plea was then interpreted as a guilty plea to generic burglary, even though neither the police reports nor buildings were mentioned during the actual plea proceeding. To avoid this inference and the enhancement based on it, Shepard was required to mount a "challenge to the accuracy of the statements in those documents describing entries in buildings." *Id.* at 68; J.A. 87. Absent such a rebuttal, Shepard would be deemed to have admitted the truth of the allegations contained in the police reports and complaint applications. This "admission" then provided the factual basis on which the court must conclude that the defendant believed that he was pleading guilty to generic burglary, despite the nongeneric complaint and statute. Shepard's belief, thus established, was substituted for the *Taylor* requirement that all of the elements of generic burglary had been admitted or otherwise established during the plea proceeding. By changing the question, the burden was

[5] The constitutional requirement is that these thoughts be verbalized and recorded so that speculation about them is unnecessary. *Henderson v. Morgan*, 426 U.S. 637, 647 (1976).

effectively shifted to Shepard to prove that he did not have three or more generic burglary convictions.

Respondent defends first by asserting that the court of appeals did not shift the burden to the defendant "to show that the [ACCA] enhancement does not apply." Resp. Br. 33. In the next breath, however, Respondent admits that the court did place "demands" on Petitioner to rebut the police reports and complaint applications or suffer the enhancement. *Id.* at 34. In fact, during argument before Judge Gertner, Respondent explicitly took the position that, with the production of the police reports "we have met our initial burden of proof; and, at that point, *the burden does shift . . . to the defendant.*" J.A. 114 (emphasis added). For this proposition, Respondent relied on *Shepard II*: "But I think Judge Lipez could not be clearer when he says that, more specifically, after discussing Harris, did the defendant provide anything at his plea hearings . . . to contest those facts set forth. And we have nothing."[6] J.A. 115.

Hedging its argument that the burden was not shifted, Respondent suggests that the demands of the burden shifting were not "exorbitant":

> For example, petitioner could have filed an affidavit in which he swore that on the occasions in question, he had pleaded guilty to the burglary of a ship or vehicle nowhere mentioned in the complaint application or police report. *See*, J.A. 117 (prosecutor states that it would have been sufficient for petitioner to state that "[a]t the time of my plea I told them it was not a building, it was a car," or even "I contested it in some way").

[6] This burden shifting argument was rejected by the district court. Addressing it, Judge Gertner said to the government: "But the question is whose burden is that? If it is your burden, the 'nothing' means that there is no enhancement." J.A. 115.

Resp. Br. 34-35. Shepard did file an affidavit swearing that Respondent's documents were not involved in any of his guilty plea proceedings, J.A. 100, but Respondent and the First Circuit regard that fact as irrelevant. The same is true for Judge Gertner's finding (based on everything she had before her, including Respondent's documents) that the facts contained in the police reports "never came up" at the plea proceedings and that there was "no indication that they were ever made part of the record of the plea colloquy." J.A. 161-62, 165. The district court observed that "[a] review of the plea colloquy would obviously enable me to reconstruct the plea and answer the relevant questions." J.A. 160. In view of all the evidence, the sentencing court concluded that Respondent had failed to meet its burden of proof with the police reports. J.A. 161-62, 165.

Respondent defends *Shepard IV*'s rejection of the district court's findings and conclusions by claiming that it had produced "overwhelming" evidence "that petitioner had pleaded guilty in five cases in which the complaint application and incorporated police report clearly *indicated* that the offense involved burglary of a building." Resp. Br. 34 (emphasis added). This is a perfect example of determining the nature of the conviction from the alleged underlying conduct rather than from the elements of the offense. This is precisely forbidden by the *Taylor* categorical approach, which provided a negative response to the question "whether, in the case of a defendant who has been *convicted* under a nongeneric-burglary statute, the Government may seek enhancement on the ground that he *actually committed* generic burglary." *Taylor*, 495 U.S. at 599-600 (emphases added).

There is nothing in *Taylor* to suggest that a sentencing court is free to shift the burden of persuasion to the defendant once the government has raised an inference that he pleaded guilty to generic burglary, yet this is the position espoused by Respondent. Resp. Br. 34. The First Circuit created this

burden-shifting construct specifically for the purpose of making inherently ambiguous guilty plea convictions available as sentence enhancers under the ACCA. It rejected the *Taylor* requirement that the conviction (as opposed to the underlying conduct) "necessarily implies that the defendant has been found guilty of all the elements of generic burglary" (*Taylor*, 495 U.S. at 599) in the guilty plea context. *Shepard II*, 231 F.3d at 68-69; J.A. 89. This approach allowed the court to place a burden on the defendant, which required him to present "'countervailing evidence to defeat the inference' that he had pleaded guilty to generic burglary." Resp. Br. 34. Shifting the burden to the defendant to disprove applicability of the ACCA is incompatible with *Taylor*. It requires reversal of *Shepard IV* and reinstatement of the judgment of the district court.

C. The *Shepard* Account Of The Relationship Of The Police Reports And Complaint Applications To The Guilty Pleas Is Inaccurate.

In support of the "compelling inference" that the complaints embodied the facts alleged in the police incident reports and that Petitioner's guilty pleas were to the complaints, Respondent and the First Circuit present a thumbnail sketch of the law, practice and procedure followed in Massachusetts district courts regarding the criminal complaint application process and its relationship to criminal litigation in those courts. *Shepard IV*, 348 F.3d at 309-10, 314; J.A. 174, 182; Resp. Br. 25-28. These descriptions of Massachusetts law and procedure are simply wrong.

Moreover, even if all of Respondent's arguments about Massachusetts district court procedure and practice are accepted, *arguendo*, they fail to establish that the federally relevant element – entry of a building – was necessarily adjudicated in the state court guilty plea proceedings. The district court explicitly found that this issue was not addressed there. *Shepard III*, 181 F. Supp. 2d at 23-26; J.A. 161-62, 165.

Respondent's assertion that the underlying conduct alleged in the complaint applications and police incident reports was "embodied" in the complaints is a metaphysical construct. The "building" allegations did not make it into the complaints. No Massachusetts law or practice supports the court's statement that they are nevertheless "embodied" in the complaint. The complaint application "is merely an aid to the court in facilitating the preparation of the Complaint." The complaint is the document used in the courtroom. *Arias*, 778 N.E.2d at 527-28. Massachusetts complaints are not at all like federal informations, *Commonwealth v. Baldassini*, 260 N.E.2d 150, 154-55 (Mass. 1970), nor like the complaints issued in Maryland, where the affidavits of the complaining witnesses are attached to, and made part of the complaint as a matter of state law. *Compare United States v. Coleman*, 158 F.3d 199, 202-03 (4th Cir. 1998), *with Shepard IV*, 348 F.3d at 314; J.A. 183 (citing *Coleman*); *contrast Franklin*, 235 F.3d at 1171-72 (factual allegations in charging papers are inadequate to establish elements of conviction).

Respondent argues that discovery rules in the Massachusetts district court support a finding that the police incident reports and complaint applications were furnished to Petitioner, and that Massachusetts law presumes that individual defendants have personal knowledge of the contents of police reports furnished in discovery. Resp. Br. 26-27. Neither of the discovery rules cited by Respondent applies to any of Petitioner's convictions. Superior Court Standing Order 2-86 applies only in Superior Court.[7] The version of District Court Rule 3 cited by Respondent was promulgated in 1994 and went into effect in 1996 (*id.* at 27), after the last of Petitioner's guilty plea convictions. Accordingly, nothing presented by Respondent supports an

[7] The Massachusetts Trial Court is composed of seven administrative departments, including the Superior Court Department and the District Court Department, each promulgates its own rules. Mass. Gen. Laws ch. 211B; *id.* ch. 213 § 3.; *id.* ch. 218 § 43.

inference that the police incident reports or complaint applications were given to the defendant in any of Petitioner's cases.

Massachusetts law does not presume that a criminal defendant has personal knowledge of the contents of police incident reports, which accompanied the complaint applications in his case. Both the First Circuit and Respondent cite *Commonwealth v. Brown*, 748 N.E.2d 972, 981 (Mass. App. Ct. 2001) for the proposition that it does. Resp. Br. 25 & 26 n.4; *Shepard IV*, 348 F.3d at 310; JA 174. The word "presumption" does not appear in that opinion, in which the court held that, on the facts of that case as disclosed in the trial transcript, the defense (not the defendant individually) was actually aware of facts stated, *inter alia*, in a police report which had been provided in discovery.[8] *Brown*, 748 N.E.2d at 981-82. Respondent's argument that the conduct attributed to Petitioner in the police incident reports is "embodied" in the complaint and that Petitioner pleaded guilty to that conduct is thus unfounded.

Respondent cites "[s]everal factors [which] give rise to the strong inference that, absent evidence to the contrary, petitioner's guilty pleas constituted admissions to breaking and entering a building." Resp. Br. 26. The first is the statement in a practice book that in Massachusetts courts the factual basis for a guilty plea is usually established by, *inter alia*, a reading of the police reports. *Id.* (citing 2 Blumenson et al., *Massachusetts Criminal Practice* § 37.7B at 288 (1998)). But Judge Gertner's findings constitute "evidence to the contrary," which precludes Respondent's inference.

This discussion places the First Circuit's "compelling inference" on its real footing. It rests solely on the First

[8] Respondent misreads *Commonwealth v. Durling*, 551 N.E.2d 1193, 1200-01 (Mass. 1990) (Resp. Br. 32), to say that police reports are "inherent[ly] reliabl[e]." *Durling* addresses two specific police reports and not police reports in general. 551 N.E.2d at 1200.

Circuit's conclusion that Petitioner actually committed generic burglaries, was constructively charged with generic burglary in the nongeneric complaints, and constructively pleaded guilty to generic burglary despite Respondent's failure to present any evidence of what really occurred in any one of the guilty pleas. *Shepard IV*, 348 F.3d at 311-12, 314; J.A. 176-78, 181-83.

D. The "Happenstance" Of State Court Record Keeping Does Not Warrant Respondent's Proposed Expansion Of *Taylor*.

At bottom, the argument that resort to the defendant's underlying conduct is necessary appears to be prompted primarily by the fact that *Taylor*'s categorical method "would frequently make it impossible for the government to pursue enhancements against even the worst offenders, as this case demonstrates. . . . Such a rule would have a particularly grave effect in Massachusetts, where recordings of plea colloquies are routinely destroyed after only a brief retention period." Resp. Br. 29. Several responses to this argument are warranted.

First, the *Taylor* Court cited "the happenstance of state court record-keeping practices" (Resp. Br. 29) as a strong reason for concluding that Congress intended that a categorical analysis rather than a factual analysis of the defendant's underlying conduct be employed in administering the ACCA's sentence enhancement. With respect to guilty pleas *Taylor* noted: "Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts." 495 U.S. at 601. Strict adherence to the categorical method reduces the impact of the vagaries of state court record-keeping practices.[9] Second, the *Taylor* Court

[9] In *United States v. Parker*, 5 F.3d 1322, 1328 (9th Cir. 1993) the court noted that the vagaries of state court record keeping practices will have a negative impact on either the defendant or the government. Assuming that this problem will affect primarily older convictions, the

recognized that, under its categorical analysis, not all defendants with an extensive criminal record would necessarily qualify for ACCA enhancement and pointed out that conduct-based alternatives are available: "Even if an enhancement is not available under § 924(e), the Government may still present evidence of the defendant's actual prior criminal conduct, to increase his sentence for the § 922(g)(1) violation under the Federal Sentencing Guidelines." *Id.* at 602 n.10. Judge Gertner invited and then granted Respondent's request for an upward departure because Petitioner's criminal history score underrepresented the seriousness of his record. J.A. 30, 33, 47-48. In doing this, she distinguished between "the formality required for the ACCA and the formality required in evaluating an ordinary record." J.A. 120. Petitioner's criminal record was properly accounted for.

II. THE RULE OF LENITY PRECLUDES ACCEPTANCE OF THE BROADER APPLICATION METHOD ADOPTED BY THE FIRST CIRCUIT AND ADVOCATED BY RESPONDENT.

Respondent contends that Petitioner's rule of lenity argument is unclear. Resp. Br. 42. Justice Scalia, in his *Taylor* concurrence, suggested that if the Court thought the ACCA was ambiguous, the rule of lenity would apply to help resolve that ambiguity. *See Taylor*, 495 U.S. at 603 (Scalia, J., concurring). This is precisely Petitioner's point.

The First Circuit's interpretation of that categorical analysis in the *Harris* line of cases (defended by Respondent, Resp. Br. 42) assumes there exists an ambiguity to be resolved (the "nature" of the prior plea), that by extension lies in the statute

court followed "the general sentencing principle that the passage of time should dilute – and not magnify – the effect of past conduct on punishment for present acts," (citing U.S.S.G. § 4B1.2(e)'s time limitations in calculating criminal history). This issue was presented to the district court. J.A. 126-28.

itself ("violent felony"). *Shepard IV*, 348 F.3d at 311-12; J.A. 177-78. Petitioner does not concede that the ambiguity exists. Petitioner's prior pleas were to "nongeneric" burglary charges, and the sentencing court was not required to determine anything further. If, as Respondent contends, some ambiguity necessarily remains (Resp. Br. 42) then regardless of its source, that ambiguity must be resolved in light of the rule of lenity. This is because the First Circuit's interpretations, supplanting *Taylor*'s question of law with *Harris*'s fact investigation to apply the ACCA enhancement to convictions of crimes which do not formally constitute generic burglary, present "a more extensive" punitive intent[10] than the plain meaning of the statute expounded in *Taylor*. *See Shepard IV*, 348 F.3d at 309-10, 314; J.A. 172-75, 183.

The *Taylor* Court cites with approval an appellate court decision that applies the rule of lenity to these same issues. In *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988), the Ninth Circuit held that a categorical construction of the "'otherwise'" clause of § 924(e)(2)(B)(ii) "is the approach most consistent with the principle of lenity." *Id.* at 1009. In evaluating both a fact finding method and a categorical method of applying the ACCA enhancement and concluding that Congress intended exclusive use of the categorical, the *Taylor* Court avoided the lenity questions altogether.

Respondent's argument here assumes that the following passage from *Taylor* need not necessarily be read in the conjunctive:

> For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information *and* jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government

[10] *Taylor*, 495 U.S. at 603 (Scalia, J., concurring).

> should be allowed to use the conviction for enhancement.

495 U.S. at 602 (emphasis added). In *United States v. Harris*, the First Circuit rejected a literal reading of this passage, preferring to view it as an example rather than as a prescription. 964 F.2d 1234, 1236 (1st Cir. 1992); Resp. Br. 21-22. The First Circuit construed it to permit the lower courts, in cases involving guilty plea convictions under "a single statute that covers more than one crime" to explore "other ways" to determine "which of those crimes the prior conviction involved." *Harris*, 964 F.2d at 1236. The court hypothesized that, where the indictment "simply charged a violation of the statute":

> In such a case, we believe it would be appropriate for the sentencing court to look to the conduct in respect to which the defendant was charged and pled guilty . . . because that conduct may indicate that the defendant and the government both believed that the generically violent crime ("building"), rather than the generically non-violent crime ("vehicle") was at issue.

Id. This is obviously a penalty-expansive interpretation of the statute.

In short, the *Harris* method rests on the premise that *Taylor*'s "example" of how the categorical method applies to guilty plea convictions under a nongeneric statute is ambiguous, at least in cases in which the charging document is cast in nongeneric statutory terms. The narrower interpretation is that, where only a nongeneric charging document and a general finding of guilty are available, the categorical method precludes use of the conviction for enhancement. *Taylor*, 495 U.S. at 599, 602 (sources consulted must establish that all of the elements of generic burglary were "necessarily" adjudicated). The *Harris* method is based on the broader interpretation – rejecting *Taylor*'s "necessarily" requirement – which the First Circuit prefers

because, as that court indicated in *Shepard IV*, it applies the ACCA enhancement to a broader class of cases. 348 F.3d at 311-12, J.A. 177-79. If both interpretations of *Taylor*'s construction of the ACCA are possible, the rule of lenity requires the Court to follow the narrower construction, "the one least likely to impose penalties Congress did not intend." *Sherbondy*, 865 F.2d at 1009; *see United States v. Bass*, 404 U.S. 336, 347 (1971) (plurality opinion).

III. CONSTITUTIONAL AVOIDANCE COUNSELS A NARROW READING OF *TAYLOR* AND REVERSAL OF THE FIRST CIRCUIT.

Respondent argues that Petitioner espouses a narrow reading of *Taylor* to allow this Court "to avoid addressing the question whether Congress may constitutionally draft a criminal statute that predicates an enhanced penalty on a judicial determination of the nature of a defendant's prior convictions." Resp. Br. 36. The statute to which Respondent refers is of course the Armed Career Criminal Act (18 U.S.C. § 924(e)). Petitioner's short response is that *Taylor*'s formal categorical approach provides the answer to that question.

Relying on *Almendarez-Torres*, Respondent asserts that there is "no grave doubt under current law . . . about the constitutionality of having a judge determine the *nature* of a prior conviction." Resp. Br. 36 (emphasis added). A narrow application of the *Taylor* categorical analysis would certainly support that assertion. *Almendarez-Torres* does not address the method to be employed in determining the "nature" of a prior conviction because that question had already been settled in *Taylor*. The nature of the convictions underlying the sentence enhancement in *Almendarez-Torres* – aggravated felonies – was admitted and was not involved in the resolution of the constitutional issue of whether 8 U.S.C. § 1326(b)(2) defined a separate aggravated re-entry offense or "simply authorize[d] an enhanced sentence when an offender also has an earlier conviction." *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998). Had the "aggravated

felony" issue been litigated, it would have been resolved using *Taylor*'s categorical method. *United States v. Rivera-Sanchez*, 247 F.3d 905, 907-08 (9th Cir. 2001) (en banc). *Almendarez-Torres* simply held that the Constitution did not require the fact of a prior conviction to be pleaded in an indictment. 523 U.S. at 226-27. This holding has been explained as "a narrow exception to the general rule" that "'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (alteration omitted).

Respondent's proposed expansion of the *Taylor* analysis to include factual inquiry into the conduct underlying a prior conviction, as a method of determining the "nature" of that conviction for purposes of imposing a sentence beyond the applicable statutory maximum, does raise questions implicating the defendant's Sixth Amendment right to trial by jury and Fifth Amendment right to proof beyond a reasonable doubt. *Blakely v. Washington*, 124 S. Ct. 2531, 2537-38 (2004); *Ring v. Arizona*, 536 U.S. 584, 602 (2002)

Taylor avoided this question by mandating a categorical method of analysis – posing a question of law – to be answered without regard or reference to the particular facts underlying a prior conviction whose "nature" as a "violent felony" had to be necessarily established before a sentence could be enhanced under the ACCA. 495 U.S. at 602. Respondent presses, however, for a reinterpretation of the ACCA, one that would require a sentencing court to conduct a factual inquiry into the "nature" of a prior conviction where application of the categorical method does not result in a determination that a prior conviction is a "violent felony." Resp. Br. 38-39. The "violent felony" determination is a prerequisite to imposition of the ACCA enhanced 15 year mandatory minimum sentence.

It is Respondent's suggestion that the ACCA is "genuinely susceptible" of such an interpretation that creates the need for this Court to employ the canon of constitutional avoidance in deciding the scope and flexibility of the *Taylor* categorical method of determining whether a prior conviction is a "violent felony." *Jones v. United States*, 526 U.S. 227, 239 (1999) (constitutional doubts prompted by one proposed reading of a statute should be resolved against that reading); *see also Dretke v. Haley*, 124 S. Ct. 1847, 1853-54 (2004) (electing to remand for consideration of Petitioner's ineffective assistance of counsel claim as a method of avoiding difficult constitutional questions raised by his "actual innocence" claim). Petitioner's interpretation of *Taylor* avoids that problem. *See Jones*, 526 U.S. at 239.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court Of Appeals For The First Circuit and hold that *Taylor*'s categorical analysis precludes fact finding regarding the defendant's conduct underlying his conviction in determining whether that conviction qualifies as an ACCA predicate.

Respectfully submitted,

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In the Supreme Court of the United States

REGINALD SHEPARD,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 States. NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the interpretation and constitutionality of sentencing provisions like the Armed Career Criminal Act. NACDL has filed *amicus curiae* briefs in this Court in many cases involving the interpretation of sentencing enhancement provisions, including *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). NACDL also has briefed this Court on issues concerning the definition of the phrase "violent felony" in ACCA, most notably in *Taylor* v. *United States*, 495 U.S. 575 (1990).

NACDL is particularly interested in seeing the correct rule emerge in *this* case, because of the current state of flux in the federal sentencing scheme, as a result in part of the *Blakely* decision. Because of the implications for criminal practice of

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

the rules that will be announced in this case, as well as the other cases implicating *Blakely* that the Court will hear this Term (including *United States* v. *Booker*, No. 04-104, and *United States* v. *Fanfan*, No. 04-105), NACDL wishes to present to the Court its views on behalf of its members.

STATEMENT

This Court granted certiorari to decide the degree to which a sentencing court may inquire into the facts underlying a state-court guilty plea to determine whether the plea was to a burglary qualifying as a "violent felony" within that term's meaning in the Armed Career Criminal Act,18 U.S.C. § 924(e) (ACCA). The Court addressed a similar question 14 years ago, stating in part that, if "the *charging paper* and *jury instructions* actually required the jury to find all the elements of generic burglary in order to convict the defendant" (*Taylor* v. *United States*, 495 U.S. 575, 602 (1990) (emphasis added)), the state-court conviction was for a violent felony as that term is defined by ACCA. Here, instead of facts reflected in a jury verdict (or admitted by petitioner), the court of appeals ordered inquiry into documents – police reports and complaint applications – never subjected to any testing in the adversarial process.

Three days after the June 21, 2004, grant of certiorari in this case, this Court issued an opinion that casts even more fundamental doubt on the result reached by the court of appeals below. In *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 2537 (emphasis in original). This holding calls into further doubt the result in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1997). That case permits a defendant's prior conviction to be treated as a mere sentencing factor outside the province of a jury. *Id.* at 247. This case is an excellent vehicle for deciding whether *Almendarez-Torres* should be overruled, as well as the *Taylor* issue on which certiorari was granted.

Petitioner was arrested for, was charged with, and pleaded guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). *United States* v. *Shepard*, 125 F. Supp. 2d 562, 567 (D. Mass.) (*Shepard I*), rev'd, 231 F.3d 56 (1st Cir. 2000). At the time of his conviction, petitioner had a criminal record that included five prior guilty pleas to violations of Mass. Gen. L. ch. 226 §§ 16 and 18. Those sections criminalized conduct that meets the *Taylor* definition of "generic" burglary, but also covered other conduct – such as breaking into vehicles and ships – that does not. See *Shepard I*, 125 F. Supp. 2d at 566 n.8. In each case, petitioner had "pleaded guilty to a generally worded complaint" that did not specify what he had burglarized. *Shepard I*, 125 F. Supp. 2d at 566.

After petitioner pleaded guilty, the probation office prepared a pre-sentence report (PSR) containing facts relating to his criminal history, including violations of the Massachusetts burglary statutes. 125 F. Supp. 2d at 566. Petitioner objected to the contents of the PSR to the extent that they recited facts "beyond the face of the complaints and specifically, any reference to police reports and complaint applications." *Id.* at 564.

At the sentencing proceeding, the government argued that petitioner's prior criminal record met the requirements for a 15-year minimum sentence under Section 924(e)(1), because petitioner had been convicted on at least three prior occasions in Massachusetts state court after guilty pleas to burglary. *Shepard I*, 125 F. Supp. 2d at 568 & n.11. The government submitted police reports and criminal complaint applications from the prior convictions, and contended that those documents constituted evidence that petitioner had pleaded guilty on each occasion to generic burglary, as required by ACCA and *Taylor*. *Id.* at 569. However, the government did not submit "plea colloquies or plea agreements." *Ibid.*

The district court interpreted *Taylor* and other precedents to preclude consideration of the police reports and complaint applications. And, because "[t]he government concede[d] that

without the police reports or complaint applications it cannot determine the precise conduct to which Shepard actually pled guilty," the court refused to impose the 15-year sentence under Section 924(e)(1). Without the ACCA enhancement, the guideline range was 30-37 months. The district court exercised its discretion to depart upward, imposing a sentence of 46 months. *Shepard I*, 125 F. Supp. 2d at 572.

The court of appeals reversed, the district court on remand again refused to consider the police reports and again sentenced petitioner to 46 months, and the court of appeals reversed again. *United States* v. *Shepard*, 231 F.3d 56 (1st Cir. 2000) (*Shepard II*); *United States* v. *Shepard*, 181 F. Supp. 2d 14 (D. Mass. 2002) (*Shepard III*), rev'd, 348 F.3d 308 (1st Cir. 2003); *United States* v. *Shepard*, 348 F.3d 308 (1st Cir. 2003) (*Shepard IV*). The court of appeals characterized the *Taylor* categorical approach as resting "[p]artly" on "practical reasons of administration." *Shepard IV*, 348 F.3d at 311. The court recognized that under *Taylor*'s categorical approach "the sentencing court can still look at the charging papers and jury instructions," but then said, "[t]he Court did not explicitly rule out attention to other court-related documents or say just how guilty pleas should be parsed." *Shepard IV*, 348 F.3d at 312.

The court then held that petitioner's failure to demonstrate that the facts underlying the state-court guilty pleas were different from those stated in the police reports required the district court to rely on the reports to determine the nature of the underlying guilty plea. 348 F.3d at 314. Assuming the accuracy of the police reports, the court stated, "it is barely possible that someone in Shepard's position might have pled guilty, not to the charge that underlay the complaint * * *, but to the burgling of some other venue such as a boat." *Ibid.* The court then undertook its own analysis of the evidence. It was "highly unlikely * * * to the point of nearly impossible" that it had happened for "most of Shepard's predicate pleas." *Ibid.* Therefore, it was "'clearly erroneous'" for the district court *not*

to find that petitioner had pleaded guilty to burgling a building at least three times. *Ibid.*

SUMMARY OF THE ARGUMENT

I. The existence of prior convictions is not meaningfully distinguishable from any other factual finding necessary to increase a defendant's sentence beyond the otherwise applicable maximum. Sentencing enhancements made on that basis must therefore be authorized by a jury verdict or a defendant's admission. *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1997), which reasons otherwise, was wrongly decided, has been undermined by subsequent decisions of this Court, and should now be expressly overruled.

II. Alternatively, the holding of the First Circuit below can in no way be squared with this Court's unanimous decision in *Taylor*, adopting a "categorical" approach to determining what state-law crimes qualify as "burglary" under ACCA. The Court held that the fact of conviction and the statutory definition of the prior offense are required to determine whether the prior offense was burglary under ACCA. Noting that some statutes defined offenses more broadly, the Court held that a sentencing court could look further, "in a narrow range of cases where a jury was actually required to find all the elements of generic burglary." *Taylor*, 495 U.S. at 602.

Taylor's categorical rule does not permit inquiry into police reports and criminal complaint applications. Such forms of evidence are not the products of testing in the adversarial process and thus lack reliability. Additionally, the inquiry required by the court of appeals placed on petitioner the burden to prove that he did not plead guilty to certain activities, rather than requiring the government to prove that he did. These errors undermine *Taylor*'s foundational principles of ease of administration and fairness to the defendant.

ARGUMENT

I. *Almendarez-Torres* Was Wrongly Decided, Has Been Eroded By Subsequent Cases, And Should Be Overruled

Although this case presents important issues about how recidivism findings are made under ACCA, those issues are subsidiary to an even more significant question about the constitutionality of the statute's application. ACCA "raises the penalty for possession of a firearm by a felon from a maximum of 10 years in prison to a mandatory minimum sentence of 15 years and a maximum of life in prison without parole if the defendant 'has three previous convictions * * * for a violent felony or a serious drug offense.'" *Custis* v. *United States*, 511 U.S. 485, 487 (1994) (quoting 18 U.S.C. § 924(e)). The determination that the defendant has the convictions necessary to trigger application of the increased sentence is made by a federal judge, not by a jury.

Based on petitioner's plea of guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), he faced a *maximum* sentence of ten years. He did *not* admit (and has never admitted) committing three or more "violent felonies," as that term is defined in ACCA. Yet, if the First Circuit's decision is upheld and petitioner is sentenced based on a factual finding, which he contests, about the nature of his prior convictions, he will face a *minimum* sentence of 15 years (and a possibility of life in prison). If applied here, ACCA would therefore require the sentencing judge to impose "a sentence greater than the maximum [s]he could have imposed * * * without the challenged factual finding." *Blakely*, 124 S. Ct. at 2537. In any other context, such a sentence would plainly violate the Sixth Amendment, which forbids judges from imposing punishment beyond the range authorized "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Ibid.* (emphasis in original).

The judicial factfinding at issue here, however, concerns recidivism. Under current law, that makes all the difference. In

Almendarez-Torres v. *United States*, 523 U.S. 224 (1997), the Court discerned no constitutional problem with a federal statute that allowed a defendant's sentence to be increased from a maximum of two years to a maximum of 20 based on a fact – that the defendant had a prior aggravated felony conviction – that had not been charged in the indictment.[2] And, although the Court's subsequent decision in *Apprendi* v. *New Jersey*, 530 U.S. 466, cast significant doubt on both the reasoning and the result of *Almendarez-Torres*, *Apprendi* does purport to exempt "the fact of a prior conviction" from its otherwise-universal rule that any fact that "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

It is thus clear that, but for *Almendarez-Torres* and the corresponding exception to the *Apprendi* rule, the conclusion reached by the court of appeals in this case – that "the district court *must* sentence Shepard under [ACCA] and apply the mandatory minimum prescribed by Congress" (*Shepard IV*, 348 F.3d at 314-315) – would be unconstitutional. Accordingly, the present case provides a timely opportunity for this Court to revisit *Almendarez-Torres*. By overruling *Almendarez-Torres* and eliminating the ill-fitting recidivism exception to *Apprendi*, the Court would keep faith with the animating principle of its more recent decisions: that every fact authorizing additional punishment against a criminal defendant must have been either found by a jury or admitted by the defendant. See *Blakely*, 124 S. Ct. at 2537; *Apprendi*, 530 U.S. at 490. Exempting recidivism findings from that bedrock rule is supported neither by logic nor by experience. Indeed, it is supported only by

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[2] The petitioner in *Almendarez-Torres* admitted, in the course of pleading guilty to violating 8 U.S.C. § 1326, that he had been deported "pursuant to" three earlier felony convictions. See *Almendarez-Torres*, 523 U.S. at 227. It was thus undisputed that he had actually been convicted of the crime that triggered the sentencing enhancement, so the only constitutional issue discussed by the Court was whether the fact of those prior convictions had to be presented in the indictment.

Almendarez-Torres itself, a decision whose assumptions and reasoning were problematic from the start and have been fatally undermined by subsequent cases. See *Monge* v *California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting) (describing *Almendarez-Torres* as "a grave constitutional error affecting the most fundamental of rights").[3]

A. Despite the indisputable importance of *stare decisis*, when the "necessity and propriety" of overruling prior decisions have been established, the Court has not hesitated to act. *Ring* v. *Arizona*, 536 U.S. 584 (2002) (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989)). *Stare decisis*, after all, is not an "inexorable command," *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991), but instead reflects "a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) (internal quotation omitted). *Stare*

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[3] Because the constitutional claim in *Almendarez-Torres* concerned only notice (*i.e.* whether the fact of prior conviction must be charged in the indictment), the case could be limited to its facts, as having not definitively resolved whether recidivism findings may properly be made by a judge under something less than a reasonable doubt standard. See Colleen P. Murphy, *The Use of Prior Convictions After* Apprendi, 37 U.C. DAVIS L. REV. 973, 994 (2004) (noting that "neither *Almendarez-Torres* nor *Apprendi* answered whether the Constitution requires a jury trial and proof beyond a reasonable doubt on the existence of a prior conviction"); cf. *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004) (limiting reach of *Oregon* v. *Elstad*, 470 U.S. 298 (1985)). Moreover, as the Court noted in *Apprendi*, the defendant in *Almendarez-Torres* had actually admitted the prior convictions, so his case raised "no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact." 530 U.S. at 488; see also *Jones*, 526 U.S. 227, 248-249 (2002). *Almendarez-Torres* thus could be read to stand only for the propositions that recidivism need not be alleged in the indictment and that a recidivism charge may support a sentencing enhancement when the defendant *admits* that he was convicted of the prior offenses on which the increased sentence is based. That approach would be consistent with *Blakely*'s core holding that, "[w]hen a defendant pleads guilty, the State is free to seek judicial sentence enhancements *so long as* the defendant either stipulates to the relevant facts or consents to judicial fact-finding." 124 S. Ct. at 2541 (emphasis added).

decisis is of course far weaker in constitutional cases than in statutory cases, see *Payne*, 501 U.S. at 828, and this case arises in a particular area of constitutional law in which there is especially strong reason to reconsider an incorrect precedent. See *Harris* v. *United States*, 536 U.S. 545, 572 (2002) (Thomas, J., dissenting) ("[C]onsiderations of *stare decisis* are at their nadir in cases involving procedural rules implicating fundamental constitutional protections afforded criminal defendants.").

For *stare decisis* purposes, *Almendarez-Torres* is perhaps most analogous to *Sinclair* v. *United States*, 279 U.S. 263 (1929). *Sinclair* held that a particular determination on which the defendants' punishment was conditioned – the "pertinency" element of a criminal contempt statute – need not be found by the jury, but could instead be submitted to and decided by the judge. *Id.* at 298. In *United States* v. *Gaudin*, 515 U.S. 506 (1995), this Court faced a very similar question: whether the Fifth and Sixth Amendments require that the "materiality" element of 18 U.S.C. § 1001 be found by the jury beyond a reasonable doubt. Concluding that the Constitution did so require, the Court overruled *Sinclair*. See *id.* at 519-522. The Court identified three considerations that compelled its decision to do so.

First, the force of *stare decisis* was reduced because the question whether a particular fact is properly decided by a judge or a jury involves a "procedural rule * * * which does not serve as a guide to lawful behavior." 515 U.S. at 521; see also *Hohn* v. *United States*, 524 U.S. 236, 251-252 (1998). Second, the Court's conclusion that the jury must decide the elements of the offense "rests upon an interpretation of the Constitution." 515 U.S. at 521. Finally, "*stare decisis* cannot possibly be controlling when, in addition to those factors, the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *Ibid.*; see also *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997).

B. The case for overruling *Almendarez-Torres* is, if anything, stronger than was the case for dispatching with *Sinclair*. In holding that the Sixth Amendment does not require the fact of prior convictions – even those that increase the range of punishment to which the defendant is subject – to be alleged in the indictment, *Almendarez-Torres* articulated a procedural rule grounded in the Constitution. This is so even if that rule is understood to apply beyond the context of indictments, to allow recidivism findings to be made by judges rather than juries. See *Gaudin*, 515 U.S. at 521; see also *Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2523 (2004) ("Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules, a conclusion we have reached in numerous other contexts.").

Moreover, and more important, *Almendarez-Torres* is perhaps the paradigm of a decision that not only was wrong when it was decided, but also has been significantly undermined by later cases. Indeed, Sixth Amendment law has been upended since *Almendarez-Torres* pronounced it "absolutely clear" that it was wrong to suggest that "Congress cannot permit judges to increase a sentence in light of recidivism, *or any other factor*, not set forth in an indictment and proved to a jury beyond a reasonable doubt." 523 U.S. at 240 (emphasis added). That dramatic transformation began almost immediately after *Almendarez-Torres* was decided.

1. In *Jones* v. *United States*, 526 U.S. 227 (1999), the Court examined the same body of law as *Almendarez-Torres*, yet reached a very different conclusion. Whereas the Court in *Almendarez-Torres* discerned no general rule that facts increasing the maximum penalty to which the defendant is exposed raise Sixth Amendment concerns, the Court in *Jones* suggested just such a principle. 526 U.S. at 243 n.6. Whereas the Court in *Almendarez-Torres* discerned no constitutional norm strong enough to convert a recidivism finding that increased the maximum penalty into an element of 8 U.S.C. § 1326, the Court in *Jones* determined that serious Sixth Amendment concerns compelled it to read a provision increasing the sentence for

carjacking under 18 U.S.C. § 2119 as an element of the offense. 526 U.S. at 239-252. *Jones* canvassed history, at which *Almendarez-Torres* had barely glanced, and ascertained that the Framers put the protection of the jury from the encroachment of judicial factfinding at the heart of the jury-trial right. See *id.* at 244-248. And, although *Jones* distinguished *Almendarez-Torres*, it did so with some equivocation, narrowly describing it as a case primarily about the "possible constitutional distinctiveness" of recidivism. *Id.* at 248-249 & n.10.

2. A more serious blow came the next Term in *Apprendi*. *Apprendi* confirmed the general Sixth Amendment rule at which *Jones* had hinted: that facts increasing the quantum of punishment that a defendant faces must be found by jury beyond a reasonable doubt. See 530 U.S. at 490. Although *Apprendi* did not overrule *Almendarez-Torres*, the Court made no secret that it was retreating from the broader constitutional foundations of that decision, describing it as "at best an exceptional departure from the historic practice that we have described." 530 U.S. at 487. The Court explained that "it is arguable that *Almendarez-Torres* was incorrectly decided and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Id.* at 489-490.

Apprendi thus recognized that *Almendarez-Torres*'s recidivism holding fit uncomfortably with the Court's clarified understanding of the Sixth Amendment. Indeed, along with its citation to Justice Scalia's dissent in *Almendarez-Torres*, *Apprendi* offered a criticism of its own: "the Court's extensive discussion of the term 'sentencing factor' virtually ignored the pedigree of the pleading requirement at issue" – a requirement that every allegation legally essential to the punishment be charged and proven to the jury. 530 U.S. at 490 n.15. This point is elaborated in Justice Thomas's separate opinion, which makes clear that the common law pleading requirement invoked by the Court did not distinguish between the fact of a prior conviction and any other fact that "was by law a basis for imposing or increasing punishment." *Id.* at 512 (Thomas, J., concurring). The Court

in *Apprendi* thus went out of its way to highlight the analytic mistakes that informed the result in *Almendarez-Torres* and to suggest that those flaws render *Almendarez-Torres* an outlier.

Nevertheless, it was not necessary for *Apprendi* actually to overrule *Almendarez-Torres* to find the New Jersey hate crime statute unconstitutional, as that statute raised the maximum penalty based on a judicial finding that the defendant had committed a crime for a particular purpose, not on a recidivism finding. See 530 U.S. at 491-492. Because the Court had no need to revisit the narrow holding of *Almendarez-Torres*, the exception that *Apprendi* makes for recidivism findings is perhaps best understood as an interim prudential measure. See *id.* at 490 ("Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision *today* to treat the case as a narrow exception to the general rule we recalled at the outset.") (emphasis added). The *Almendarez-Torres* holding has never been tested in a case (like this one) in which the lawfulness of the defendant's sentence actually depends on the validity of the exception. Thus, even if preserving *Almendarez-Torres* was prudent in the context of *Apprendi*, the former's mistakes should not be perpetuated when they would actually make a difference to the outcome.

3. In fundamental ways, *Apprendi* and its progeny have eroded the arguments and assumptions on which the holding of *Almendarez-Torres* rests. The first concerns the way in which *Almendarez-Torres* distinguished and applied *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1987). The petitioner in *Almendarez-Torres* argued that *McMillan* created an important distinction between judicial factfinding that leads to the application of a mandatory minimum sentence (which *McMillan* upheld) and judicial factfinding that alters the maximum penalty for the crime (which *McMillan* had suggested would present a different problem). Instead of adopting such a bright-line rule, *Almendarez-Torres* fashioned a new five-factor test, which aims at determining whether a feature is a mere "sentencing factor" (which need not be part of the indictment)

or instead is an actual "element" of the crime (which must be charged). See 523 U.S. at 242-246. This methodology is, however, irreconcilable with the Court's more recent Sixth Amendment cases.

As currently understood, the relevant Sixth Amendment inquiry does *not* involve analyzing a number of different subjective factors to determine whether a law goes too far in transferring factfinding responsibility from jury to judge. Instead, "[w]hat matters is the way by which a fact entered into the sentence," *Apprendi*, 530 U.S. at 521 (Thomas, J., concurring) – that is, whether the challenged finding had the effect of increasing the sentence beyond the maximum authorized by the jury verdict or guilty plea. See *Blakely*, 124 S. Ct. at 2537 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.") (internal quotation omitted). Any finding that has that effect, however it is labeled, must be made by a jury using a reasonable-doubt standard. In so holding, *Blakely* rejected alternatives to what it called a "bright-line rule" as either too malleable or too subjective. See *id.* at 2539-2540.

Given that its basic methodology has been superseded, it is not surprising that *Almendarez-Torres*'s conclusions about the relevance of the distinction between a finding that requires a minimum penalty and one that allows a greater penalty have now also been rejected. *Almendarez-Torres* announced that the difference between these two was not a "determinative" one, 523 U.S. at 245, and had no effect on the "constitutional outcome," *id.* at 243. Indeed, insofar as it thought the distinction relevant, the Court in *Almendarez-Torres* suggested that the use of permissive maxima is actually fairer to criminal defendants and therefore might be *less* constitutionally problematic. *Id.* at 244-245. These statements have simply not survived their encounter with subsequent cases.

Similarly, in *Jones*, the Court noted the "substantiality" of the claim that judicial factfinding may not "support the applica-

tion of a provision that increases the potential severity of the penalty for a variant of a given crime." 526 U.S. at 242-243. Rather than cite to *Almendarez-Torres*, the Court returned to the suggestion made in *McMillan* that jury findings are required to raise the otherwise-applicable maximum penalty. See 526 U.S. at 242. Consistent with that distinction, the constitutional principle identified in *Jones* is one that, at a minimum, draws a fundamental line around factual findings that "increase[] the maximum penalty for a crime." *Id.* at 243 n.6. Then, in *Apprendi*, the Court expressly adopted the core Sixth Amendment rule that a legislative scheme may not remove from the jury "determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 530 U.S. at 483. In so holding, the Court distinguished *McMillan* as not involving a scheme that kept from the jury facts necessary to subject the defendant to greater punishment. See *id.* at 486. Thus, far from treating the two situations as constitutionally equivalent, the Court (since *Almendarez-Torres*) has treated increasing the allowable maximum and raising the required minimum as lying on opposite sides of a basic constitutional divide.

In *Harris*, the Court confirmed its view of that divide. There, the Court held that – even in light of *Apprendi* – findings that triggered mandatory minimums could still be made by a judge. Rejecting the equivalence drawn in *Almendarez-Torres*, the Court declared that "*McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases." 536 U.S. at 557. According to *Harris*, mandatory minimums merely limit a judge's sentencing discretion within an authorized range of punishments. "Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." *Id.* at 558. Those provisions are concerned with something else. They protect against judicial determination of "[f]acts extending the sentence beyond the

statutory maximum," which traditionally had been charged in the indictment and submitted to the jury. *Id.* at 564.

Under *Harris*, whether a fact must be submitted to the jury turns not on the "risk of unfairness to a particular defendant," *Almendarez-Torres*, 523 U.S. at 245, but on whether the fact "extend[s] the defendant's sentence beyond the maximum authorized by the jury's verdict." *Harris*, 536 U.S. at 557; see also *id.* at 566 ("[A] factual finding's practical effect cannot by itself control the constitutional analysis."). As *Harris* explained,

> The factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury. The finding in *McMillan* restrained the judge's power, limiting his or her choices within the authorized range. It is quite consistent to maintain that the former type of fact must be submitted to the jury while the latter need not be.

536 U.S. at 567; see also *Blakely*, 124 S. Ct. at 2538. In rejecting the petitioner's use of *McMillan*, *Almendarez-Torres* misunderstood that constitutional distinction.[4]

4. The recent vintage of *Almendarez-Torres* is no reason to preserve it. The Court has not hesitated to overturn newly issued decisions as soon as it became clear that they represented a break either with their predecessors or with their successors. See *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995) (overruling *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990)); *United States* v. *Dixon*, 509 U.S. 688 (1993) (overrul-

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[4] This is not the only aspect of *Almendarez-Torres*'s reasoning that has been repudiated. For example, when the Court in that case refused to adopt "a rule that any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement," it relied, in part, on the fact that such a rule would be "anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty." 523 U.S. at 247. That case law was *Walton* v. *Arizona*, 497 U.S. 639 (1990), which has now been overruled in light of *Apprendi*. *Ring*, 536 U.S. at 589.

ing *Grady* v. *Corbin*, 495 U.S. 508 (1990)); *Payne*, 501 U.S. 808 (overruling *Booth* v. *Maryland*, 482 U.S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U.S. 805 (1989)). Nearly from the moment it was decided, the scope of *Almendarez-Torres* has been narrowed and its reasoning impugned. Indeed, it can rightly be said that, even in the short time that *Almendarez-Torres* has been on the books, "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 855 (1992).

Indeed, few areas of law could be more *unsettled* than sentencing law in the aftermath of *Apprendi* and *Blakely*. Since those decisions, sentencing at both the federal and state levels has been in constant flux. See *United States* v. *Penaranda*, 375 F.3d 238 (2d Cir. 2004) (describing the effects of *Blakely*); Andrew M. Levine, *The Confounding Boundaries of* Apprendi-*Land: Statutory Minimums and the Constitution*, 29 AM. J. CRIM. L. 377, 379-380 (2002) ("*Apprendi* * * * unleashed a series of far-reaching concerns and questions in the minds of judges, attorneys, defendants, and legislators alike."). Decisions better established than *Almendarez-Torres* already have begun to yield to the logic of *Apprendi*. See *Ring*, 536 U.S. at 608-609. In this dynamic area, therefore, it is clear that "precedents are not sacrosanct," *ibid.*, and that a basic justification for *stare decisis* – ensuring that legal rules remain consistent and predictable – rings particularly hollow.

C. All that is left of *Almendarez-Torres* are its intimations that there is something constitutionally distinct about recidivism findings. As Justice Scalia pointed out in his dissent, however, "there is no rational basis for making recidivism an exception" to the general rule that any fact altering the maximum penalty for a crime must be proved to a jury beyond a reasonable doubt. 523 U.S. at 258. That criticism has been echoed by commentators. See Murphy, *supra*, 37 U.C. DAVIS L. REV. at 998; Kryon Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 408 (2002) ("[N]one of these reasons for excepting

criminal history from the *Apprendi* rule withstands scrutiny."). Indeed, not only does the fundamental logic of *Apprendi* and *Blakely* suggest no basis for a recidivism exception,[5] but the justifications that have been offered in support of such an exception do not withstand scrutiny.

1. The most common defense of the recidivist exception focuses on the "certainty that procedural safeguards attached to any 'fact' of prior conviction." *Apprendi*, 530 U.S. at 488; see also *Jones*, 526 U.S. at 249 ("[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."). This argument, however, misperceives the nature of the finding that must be made to apply a recidivism enhancement. Under ACCA, as under similar federal statutes, the finding that allows the increased sentence to be imposed is not that the defendant actually engaged in particular conduct with respect to the prior crimes, but rather that the defendant "has three previous convictions" for offenses of the sort identified by the statute. 18 U.S.C. § 924(e)(1); see *Taylor*, 495 U.S. at 602 (ACCA "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense").[6]

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[5] *Apprendi*'s liberty-based defense of its core holding brooks no obvious exception for recidivism findings: "If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of the protections that have, until that point, unquestionably attached." 530 U.S. at 484; see also Murphy, *supra*, 37 U.C. DAVIS L. REV. at 996 ("[T]he concerns about liberty and stigma offered to justify the *Apprendi* holding apply whether the contested fact involves conduct related to the underlying offense or involves whether the defendant sustained a prior conviction.").

[6] In addition to the immigration statute construed in *Almendarez-Torres* itself, 8 U.S.C. § 1326, the Violent Crime Control and Law Enforcement Act (the so-called federal "three strikes" law) imposes a mandatory life sentence on a defendant convicted of a "serious violent felony" if that person has been

An enhancement under Section 924(e) requires the govrnment to prove that the defendant was previously *convicted* of a qualifying offense, not that he was actually *guilty* of that offense. Although the latter may have already been tested through constitutionally adequate procedures, the former has not. It is thus a non sequitur to tell a defendant who contests the fact of a prior conviction that his guilt has already been determined in a way that satisfies the Sixth Amendment. The *existence* of a qualifying conviction is simply not an issue that has been adjudicated ever before.

And, as *Apprendi* and *Blakely* recognize, the Constitution does not allow defendants to be deprived of jury findings and the reasonable-doubt standard at the very moment that they seek to put the government to its proof on a new factual issue that, if found, will elevate their expected sentences beyond the range of punishment that they could have lawfully faced without such a finding. In this sense, challenges to the accuracy, authenticity, or sufficiency of the evidence put forward by the government to prove prior convictions necessary to increase the defendant's punishment are functionally indistinguishable from factual challenges of the sort to which the jury-trial right obviously attaches. They have the same consequences for the criminal defendant and should be attended by the same procedural guarantees.

2. The *Almendarez-Torres* exception has been alternatively defended based on a pragmatic calculation that – because recidivism determinations are generally straightforward and uncontested – applying *Apprendi* to them would likely make no difference in the run of cases. See *Almendarez-Torres*, 523 U.S. at 235. There are at least two basic flaws in this argument.

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convicted of two previous serious violent felonies or one serious violent felony and one "serious drug offense." 18 U.S.C. § 3559(c)(1)(A); see also 21 U.S.C. § 841(b)(1)(A)-(D) (imposing significantly enhanced sentences on a person who distributes illegal drugs "after a prior conviction for a felony drug offense has become final").

First, the underlying assumption is not necessarily valid. There are a number of circumstances in which defendants can mount plausible challenges to the government's contention that they were previously convicted of a crime qualifying for an increased sentence, whether under ACCA or under some other provision. Justice Scalia's dissent in *Almendarez-Torres* gives the apt example of unlawful entry cases, where the use of false identification documents and assumed names is rampant. See 523 U.S. at 268. In those circumstances, the mere fact that a defendant subject to a recidivist enhancement has the same name or identifying information as someone previously convicted of a qualifying offense by no means proves that the defendant was actually the person convicted. Similarly, if the predicate convictions occurred in a foreign country, in which record-keeping can be erratic and translations (especially of legal terminology) unreliable, the risk of error is real. Cf. *United States* v. *Small*, 333 F.3d 425, 427 n.2 (3d Cir. 2003) (foreign conviction can be used a predicate under Section 924(e)), cert. granted, 124 S. Ct. 1712 (2004).

Moreover, even if there is no dispute that the defendant was convicted of a prior offense, there can be significant dispute about what the offense of conviction actually was. Under ACCA, after all, whether a particular conviction is in fact a qualifying conviction often becomes the vital question – as it is in this case.[7] And, although the categorical approach adopted in *Taylor* appropriately works to limit the extent to which making determinations under Section 924(e) involves "an elaborate factfinding process regarding the defendant's prior offense," 495 U.S. at 601, there remain situations (of which the present case provides an example) in which the government and the defendant disagree about the proof of the underlying convictions. The more that making recidivism findings requires the

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[7] Lower courts have construed the *Almendarez-Torres* exception as extending "beyond the question whether a prior conviction exists and to the question of whether it is a qualifying conviction under the statute." *United States* v. *Matthews*, 312 F.3d 652, 663 (5th Cir. 2002).

kind of archaeological inquiry into primary sources that the First Circuit endorsed in this case, the more those determinations will be both contested and prone to error. In such circumstances, the burden of proof and the identity of the factfinder make a difference, both practically and constitutionally. See *Addington* v. *Texas,* 441 U.S. 418, 423 (1979) (the standard of proof "serves to allocate the risk of error between the litigant and to indicate the relative importance attached to the ultimate decision"); see also *Apprendi*, 530 U.S. at 483-484. The government should not be able to go beyond the statutory elements of the prior conviction to see what the "case files showed," *Shepard IV*, 348 F.3d at 312, while simultaneously insisting that such factfinding can proceed unconstrained by the constitutional procedures that *Apprendi* requires for every other contested factual determination that raises the maximum penalty for a crime.

Second, that a particular finding may often be easy to make (or may be undisputed) provides no reason to dispense with the protections that the Sixth Amendment, as construed in *Apprendi* and *Blakely*, requires before a defendant can be exposed to increased punishment as a result of that finding. The ease with which such findings may be made means only that the government may have little difficulty proving to the jury that the defendant was convicted of the offenses that trigger a recidivist enhancement. But it makes no sense to deprive those alleged recidivists to whom a jury-trial right and a different burden of proof *could* make a difference of those historic safeguards merely because many, or even most, other defendants would not similarly benefit. Constitutional protections do not disappear merely because, in many cases, they will not be outcome-determinative.[8]

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[8] Moreover, insofar as practical consequences matter, if it is true that overruling *Almendarez-Torres* is unlikely to cause significant disruption (because most defendants will either waive their rights or stipulate to the fact of their prior convictions), that surely provides *greater* reason for the Court to take that step. If the Court in *Blakely* was willing to allow the tremendous upheaval caused by taking the logic of *Apprendi* seriously, it cannot seriously be argued that *Almendarez-Torres* must be preserved on account of the far more modest effects of requiring recidivism to be proven to a jury.

3. The defenders of *Almendarez-Torres* have also invoked fairness, specifically the notion that "the introduction of evidence of a defendant's prior crimes risks significant prejudice." 523 U.S. at 235. Although such concerns do exist, see *Old Chief* v. *United States*, 519 U.S. 172, 185 (1995), they are not dispositive of the constitutional issue. Just as arguments about fairness did not persuade the Court in *Harris* that the *Apprendi* rule should apply when the trial jury has found (or the defendant admitted) "all the facts necessary to impose the maximum," 536 U.S. at 566, such concerns have not prevented and should not prevent the Court from applying *Apprendi* when those facts have *not* been found by the jury or conceded by the defendant. See *Blakely*, 124 S. Ct. at 2541-2542 (rejecting fairness concerns in applying *Apprendi* to determinate sentencing schemes that rely on judicial factfinding); *Apprendi*, 530 U.S. at 521 (Thomas, J., concurring) (fairness concerns do not make "the traditional understanding of what an element is any less applicable to the fact of a prior conviction").

Moreover, whatever problems jury-made recidivism findings pose can be alleviated through the use of bifurcated proceedings and, perhaps, appropriate limiting instructions or stipulations. As is the practice in some States that already protect the right to a jury trial on the recidivism issue, in a bifurcated proceeding, the jury (after finding other elements met) determines whether the defendant previously has been convicted of offenses qualifying for the enhancement. See, *e.g.*, Ind. Code Ann. § 35-50-2-8(f); N.C. Gen. Stat. § 14-7.5; cf. *Apprendi*, 530 U.S. at 521 n.10 (Thomas, J., concurring); *Old Chief*, 519 U.S. at 190 (holding that it is an abuse of discretion for a court in a Section 922(g) case to refuse to admit defendant's stipulation of his felon-status).

D. In short, none of the purported justifications for a recidivism exception provide a reasoned basis for that

"exceptional departure" from the general rule requiring jury findings for facts used to elevate a sentence beyond the otherwise-available maximum. *Apprendi*, 530 U.S. at 487. Indeed, the Court's admonition in *Blakely* fits just as well to this case: "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of his equals and neighbors rather than a lone employee of the State." 124 S. Ct. at 2543 (citation omitted). That bedrock principle, which animates the Court's understanding of the Sixth Amendment, applies equally to the accusation that a defendant has been convicted of previous crimes. *Almendarez-Torres* says otherwise and, for that reason, has no rightful place in the constitutional pantheon. *Almendarez-Torres* "was not correct when it was decided, and is not correct today. It ought not remain binding precedent." *Lawrence* v. *Texas*, 123 S. Ct. 2472, 2483 (2003).

II. In The Alternative, This Court Should Reverse The First Circuit's Overbroad Reading Of *Taylor*, And Clarify That The Government Bears The Burden Of Proving Prior Convictions Through Reliable Evidence That Reflects Adversarial Testing

In *Taylor*, this Court observed that "the practical difficulties and potential unfairness of a factual approach are daunting." 495 U.S. at 601. Nonetheless undaunted, the court below ordered the sentencing judge to inquire into police reports relating to petitioner's prior *arrests* to determine the elements of subsequent *convictions*. Its fundamental error was looking beyond matters that had been tested by the adversarial process to determine the basis for the convictions.

A. *Taylor* defined the degree to which a sentencing court could look beyond "the fact of conviction and the statutory definition of the prior offense" when inquiring whether a conviction for violating a non-generic burglary statute satisfied the definition of a violent felony under ACCA. See 495 U.S. at

599-602. As Judge Gertner concluded below: "Not very far, is the answer." What Judge Gertner labeled "the exception to the categorical approach" – but what is actually a procedure this Court endorsed for applying the categorical approach to broadly written statutes – "is a limited one." *Shepard I*, 125 F. Supp. 2d at 569.

Applying the categorical approach to defining the phrase "violent felony" under ACCA, a court must consider "the elements of the statute of conviction" and not "the facts of [the] defendant's conduct." *Taylor*, 495 U.S. at 601. Also, if the statute covers both non-violent and violent felonies, "the indictment or information and jury instructions" may be considered if they demonstrate that "the jury necessarily had to find" the elements of a violent felony under ACCA. *Id.* at 602. Thus, under *Taylor*, the only matters that may be considered to inform the question whether the crime of conviction encompassed the elements of a violent felony under ACCA are matters tested by the adversarial process, with its attendant procedural protections for defendants, in the underlying proceedings.

1. The court of appeals' opinion below does violence to these principles. Paying lip service to the directive that the elements of the underlying offense, not the conduct for which petitioner was arrested, determine whether the conviction can be used to determine the applicability of the sentencing enhancement (*Shepard IV*, 348 F.3d at 311), the court nonetheless repeatedly engaged in just such an impermissible inquiry. "There is surely an air of make-believe about this case. No one, and this includes Shepard and the district court, has seriously disputed that Shepard *in fact* broke in to half a dozen or more buildings * * *." *Ibid.* (emphasis in original). The court then held that it was "nearly impossible * * * that the police reports were mistaken as to venue for four or more of the six crimes." *Id.* at 314. It noted that petitioner did not "offer any evidence" that the police reports were incorrect. Because of these facts, the court held that it was "'clearly erroneous' to

find that Shepard did not plead guilty to at least three burglaries of buildings." *Ibid.*

The court of appeals violated another of this Court's directives by looking beyond the few documents that might show what was *necessarily* found to convict petitioner of the underlying crimes. It stated: "The Court did not explicitly rule out attention to other court-related documents * * *." 348 F.3d at 312 But *Taylor* in fact did just that. The Court explicitly refused to permit inquiry into "the government's proof at trial," or, on a guilty plea, into a record of underlying facts that perhaps the government might be able to prove, but were not necessarily the basis for the plea. *Id.* at 601-602.[9] Consistent with that approach, in *United States* v. *Palmer*, 68 F.3d 52 (2d Cir. 1995), the court refused to allow reliance on a PSR, which it viewed as simply a surrogate for the factfinding process that *Taylor* had prohibited. *Id.* at 59. Accord *United States* v. *Franklin*, 235 F.3d 1165, 1172 (9th Cir. 2000).

2. Logic dictates that the *Taylor* rule also apply in the context of prior convictions obtained (as in this case) through guilty pleas. As the court of appeals noted, "all twelve circuits that have addressed the issue have agreed that the *Taylor* analysis applies after a guilty plea." 348 F.3d at 312 n.4. But *Taylor* also recognized the particular concerns posed by guilty pleas: "[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." 495 U.S. at 602.[10] When courts apply *Taylor* to

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[9] The rule announced by the court of appeals also eviscerates this Court's prescription that looking beyond the statutory definition of the prior offense is appropriate only "in a narrow range of cases." *Taylor*, 495 U.S. at 602. Under the court of appeals' conception of the inquiry required, the sentencing court should indulge this inquiry *in every case* in which the government can produce *some evidence* pertaining to the underlying proceedings.

[10] "Plea bargains affect guilty pleas that may or may not be on all fours with the charging documents; they are the product of strategic 'bargains' after all,

prove convictions obtained by plea bargain, it is essential that they respect the same concerns of administration and fairness that *Taylor* mandates relating to convictions after jury verdicts. This the Court can do by limiting the information permissibly used to prove the elements of the underlying conviction to matters subjected to adversarial testing in the plea proceeding. Fundamentally, along with the charging document and the judgment of conviction, such information is composed of the factual basis required under Fed. R. Crim. P. 11 in every plea proceeding – in other words, the defendant's admissions. See also *Woldiger* v. *Ashcroft*, 77 Fed. Appx. 586, 590 (3d Cir. 2003) ("other courts of appeals have considered charging documents, jury instructions, plea agreements, and plea hearing transcripts to determine if a defendant's prior conviction qualifies as a 'violent felony' under the ACCA") (citing cases).

At least two circuits have applied *Taylor* successfully in the context of underlying convictions secured by guilty pleas, using a cabined approach that respects the foundational principles of *Taylor*. In *United States* v. *Howze*, 343 F.3d 919 (7th Cir. 2003) (Easterbrook, J.), faced with a statute that criminalized conduct broader than ACCA's definition of a "violent felony," the court looked only to the charging document to determine that the guilty plea was to theft from a person – which the court held qualified categorically as a violent felony under ACCA. *Id.* at 922. In *United States* v. *Demint*, 74 F.3d 876 (8th Cir. 1996), the court affirmed the sentencing judge's look at "the charging paper and the text of Demint's guilty plea to determine whether Demint's plea was to a charge meeting the generic definition of burglary." *Id.* at 877. Considering a different prior conviction, the court examined a Florida "attempt" statute, and its interpreting case law, to determine that attempted burglary under Florida law categorically met the catch-all definition of violent felony. *Id.* at 877-878.

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based on the sentence offered, the risks of trial, and the state of the evidence." *Shepard III*, 181 F. Supp. 2d at 24.

B. Important policy rationales underlie the *Taylor* rule. Concerns of administration arise when federal sentencing courts are asked to "engage in an elaborate fact-finding process regarding the defendant's prior offenses," and there are important concerns of due process and fairness to the defendant. *Taylor*, 495 U.S. at 601-602. See *Woldiger*, 77 Fed. Appx. at 591 (noting support for the *Taylor* rule including "the practical difficulties and potential unfairness of making factual findings on a contested evidentiary record, and potential due process concerns"); *Shepard I*, 125 F. Supp. 2d at 563 (categorical approach "saves judicial resources" and "is by far the fairest approach"). These principles demand that the decision below be reversed.

1. The decision below increases the likelihood that federal courts will become increasingly immersed in factfinding inquiries into underlying proceedings. *Taylor*, 495 U.S. at 601. The Court relied on a similar rationale in *Custis* when holding that defendants may not collaterally attack their underlying state-court convictions at a sentencing hearing on an ACCA enhancement. "Two considerations motivated our constitutional conclusion in *Custis*: ease of administration and the interest in promoting the finality of judgments." *Daniels* v. *United States*, 532 U.S. 374, 378 (2001).

As Judge Gertner noted in *Shepard III* (181 F. Supp. 2d at 25):

> [T]he Supreme Court ha[s] been clear about limiting collateral attacks on convictions during federal sentencing proceedings. *Custis* v. *United States*, 511 U.S. 485 (1994) * * *; *Daniels* v. *United States*, 532 U.S. 374 (2001) * * *. If, on the one hand as in *Taylor*, a defendant is not allowed to look below the surface of the plea to demonstrate that he did not *really* threaten anyone, even though the crime to which he pled was an ACCA predicate, then surely the government cannot do the reverse. It cannot look below the surface of the plea to show that even though the plea was to the general offense of breaking and entering and

> even though nothing else apparently was discussed, what was *really* going on was a plea to a violent crime.

2. The approach followed by the court of appeals below raises substantial due process concerns. A defendant has a due process right to be sentenced on the basis of accurate information. *Townsend* v. *Burke*, 334 U.S. 736, 740 (1948).[11] See also *United States* v. *Tucker*, 404 U.S. 443, 447-448 (1972) (noting the likelihood that a defendant's sentence might have been different if the judge had known that prior convictions had been unconstitutionally obtained). As one commentator has noted, "[t]he accuracy of fact-finding is determined by the burden of proof, the reliability of the underlying evidence, and the opportunity for review of the decision." Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 301 (1994). The court of appeals' approach shifts to petitioner the burden of proof, and relies on police reports that lack any assurance of reliability to enhance a defendant's sentence dramatically.

Such burden-shifting violates this Court's rule that facts relevant to the imposition of a mandatory minimum sentence must be proved by the government. See *McMillan*, 477 U.S. at 91; see also *United States* v. *Cooper*, 375 F.3d 1041, 1052 (10th Cir. 2004) ("Whenever a prior conviction is relevant to sentencing, the government must establish the fact of that conviction by a preponderance of the evidence.").[12]

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[11] In *Townsend*, the sentence was overturned because the sentencing court had failed to distinguish prior *arrests* from prior *convictions*. 334 U.S. at 740. The court of appeals' apparent willingness to rely on the untested records of petitioner's arrests implicates this right in much the same manner as in *Townsend*.

[12] There is a substantial issue about what the appropriate burden of proof should be. Some recidivist statutes expressly place on the government the burden of proof beyond a reasonable doubt. See, *e.g.*, *United States* v. *Green*, 175 F.3d 822, 833-834 (10th Cir. 1999) (interpreting 21 U.S.C. § 851). In *United States* v. *Watts*, 519 U.S. 148, 156 (1997), the Court stated, "The [U.S. Sentencing] Guidelines state that it is 'appropriate' that facts

Parke v. *Raley*, 506 U.S. 20 (1992), is not to the contrary. In that case, the Court permitted a State to adopt, as part of its recidivist statute, a presumption that a previous, final, unchallenged conviction was valid. The defendant therefore could be required to produce evidence demonstrating the invalidity of the conviction to avoid a consequent sentence enhancement. *Id.* at 31. This case is very different. Rather than challenging the *validity* of the underlying conviction, petitioner argues that there has been no showing of *what* he was convicted of in the relevant respect. Applying *Parke* in this context would require the Court to indulge the presumption, not that the *conviction* is valid, but that the *police report* is valid.

The due process concern is heightened if consideration is given to matters that have not been subjected to adversarial testing under standardized procedures designed to ensure their reliability. Such testing occurs in trial through the adversarial process, resulting in the jury instructions and a verdict form. Such testing occurs at a guilty plea through the requirements of a plea colloquy, and through enforcing the "knowing and intelligent 'waiver" requirement. But there are precious few such protections available to ensure the reliability of facts at the sentencing stage.[13] If *Taylor* survives along with *Almendarez-*

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relevant to sentencing be proved by a preponderance of the evidence" (internal citation omitted). The Court also noted, but did not reach, the question whether "relevant conduct that would dramatically increase the sentence" – like the prior convictions in this case – "must be [proved by] clear and convincing evidence." *Ibid.*

[13] The police reports relied on by the court of appeals – representing double layers of hearsay – are a prime example of unreliable evidence. "Hearsay evidence has raised the greatest concern with reliability of evidence at sentencing." Young, *supra*, 79 CORNELL L. REV. at 342. Evidence rules protect against the use of hearsay evidence at trial, and operate also to protect the defendant's rights under the Confrontation Clause as well as the Due Process Clause. *Ibid.* Without question, the police reports relied on by the courts below would be inadmissible at trial. According to Judge Becker, "the notion of 'reliable hearsay' is, theoretically at least, an oxymoron." Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years – The Effect of "Plain Meaning" Jurisprudence, the Need for an*

Torres, this Court should articulate the framework it identified in *Taylor*. Under that framework, the government must bear the burden of proving prior convictions through reliable evidence that reflects adversarial testing – a categorical, limited approach that advances the goals of fairness and ease of administration.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 GEO. WASH. L. REV. 857, 889 (1992). "Given the centrality of the district court's findings under the new re[illegible] reliance upon inadmissible evidence at the sentencing stage presents a serious problem." *Id.* at 890. See also Young, *supra*, 79 CORNELL L. REV. at 343-351 (discussing other problems of unreliable evidence being used in sentencing proceedings).